Diane Philips
Wake Forest
Cumulative GPA: 4.0

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Biology Lab	Gibson	A		
First Year Seminar	Frank	A		
Introductory Biology	Gibson	A		
Medical Ethics	Iltis	A		
Psychology	Batten	A		

Grading System Description
Wake Forest assigns grades A-F and does not award any grade above an A.

Diane Philips
University of North Carolina-Charlotte
Cumulative GPA: 4.0

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Writing & Rhetoric	Mahaffey	A	3	
General Chemistry I	Michael	A	3	
General Chemistry I Lab	Michael	A	1	
Precalculus	DiFranco	A	3	
Theatre	Morango	A	3	
Western History and Culture	Cox	A	3	

Summer 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Calculus 1	Kaplan	A	3	
General Chemistry II	Love	A	3	

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American Gothic Fiction	Shealy	A	3	
Comparative Politics	Whitaker	A	3	
Honors Topics: American Exceptionalism: Federalism and Free Markets	Perry	A	3	
Intermediate Spanish I	Gracia	A	3	
Theory and Practice of Tutoring Writing	Vorhees	A	3	
Topics for Teachers	Jew	A	1	

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American Politics	Geirsch	A	3	
British Literature of the Restoration and 18th Century	Gargano	A	3	
Honors Global Connections	Perry	A	3	
Journalism Practicum	Maikranz	A	2	
Judicial Process	Perry	A	3	
Writing About Literature	Brockman	A	3	

Summer 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

International Politics	Walsh	A	3	

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Approaches to Literature	Socolovsky	A	3	
Into to the Trial Process	Usher	A	3	
Philosophy of Law	Kunich	A	3	
Public Speaking	Smith	A	3	
Shakespeare's Late Plays	Hartley	A	3	

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
British Victorian Literature	Rauch	A	3	
Honors Citizenship	Michael	A	3	
Honors Game Theory	Perry	A	3	
Masterpieces of Russian Literature	Baldwin	A	3	
Political Science Methods	Geirsch	A	4	

Summer 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
British Arts and Culture	Hartman	A	3	Study Abroad
Race, Gender, and Justice Across the Pond	Hartman	A	3	Study Abroad

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American Literature of the Realist and Naturalist Period	Shealy	A	3	
Constitutional Law and Policy	Perry	A	3	
Gender and the Law	Szmer	A	3	
Independent Study	Szmer	A	3	
Shakespeare's Early Plays	Melnikoff	A	3	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
History of the Book	Melnikoff	A	3	
Honors Senior Thesis	Szmer	A	3	
Ideology, Crime, and Justice	Cutlip	A	3	
Mock Trial	Usher	A	1	
Trauma, Memory, and Migration in Contemporary	Socolovsky	A	3	

American Literature and
Culture

Grading System Description
UNC Charlotte assigns grades from A-F and does not assign +/- grades.

Juval O. Scott
Federal Public Defender

Monica D. Cliatt
First Assistant Federal Public Defender

Randy V. Cargill
Nancy C. Dickenson-Vicars
Brooks A. Duncan
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The Honorable Judge Elizabeth Hanes
United States District Court
Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am writing to enthusiastically recommend Diane Philips for a clerkship. I consider myself lucky to have known Ms. Philips in two different capacities. First, I supervised her when she was an intern in our office during her second year at the University of Virginia School of Law. I then had the opportunity to teach Ms. Philips in the Criminal Defense Clinic during her third year of law school.

Ms. Philips stands out among the many law students I have had the opportunity to work with over the years. She is an incredibly diligent researcher and writer. She assisted our office with complicated motions, appellate briefs, and even drafted a cert petition. Ms. Philips is also a gifted advocate at trial. Her careful preparation led her to obtain an acquittal for one of her clients in the defense clinic. Ms. Philips has clearly demonstrated her interest and capability when it comes to criminal cases, but I have no doubt she would be equally capable in assisting this Court with civil matters as she is a very quick study. Ms. Philips is thoughtful, and never the type to speak just to hear herself talk. Her contributions in class, and to our office, were always based on careful research and consideration.

I recommend Ms. Philips to you without hesitation, and would be happy to provide any more information that may be useful,

With best regards,

Lisa M. Lorish
Assistant Federal Public Defender

Jennifer Givens
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903

April 12, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I understand that Diane G. Philips, a member of our class of 2020, has applied for a clerkship in your chambers, I am very pleased to offer my highest recommendation in
support of her application.

I met Diane last fall, when she began her 2L year as a student in the year-long Innocence Project Clinic. (Diane was a member of the related Innocence Project pro bono clinic during her first year, and her team leader highly recommended her for a spot in the year-Jo ng academic clinic.) Students in our clinic must attend weekly classes and are assigned to work on two cases at a time. On average, students spend 15-20 hours each week working on preparation for class and assignments associated with their casework. Diane was a stellar student and a highly motivated and dedicated team member. He r scrupulous work as a student and team member will serve her well in her legal career.

Diane is soft-spoken but not shy. She is confident, and for good reason: she is smart, thoughtful and always prepared. Diane's comments and questions during class betrayed her understanding of the complex nature, competing interests and persistent problems inherent in the criminal justice system. Her true competence and dedication to the clinic's mission, however, became apparent in her work on behalf of our clients.

In her clinic work, Diane reviews and digests transcripts, she identifies and searches for missing information, thinking creatively about how to obtain additional critical information about the crime, witnesses and/or alternate suspects. He r knowledge of the relevant material is impressive. I rely on her command of the record during our team meetings and investigative trips.

Diane has not hesitated to accept even most unenviable of tasks, including spending hours in a local county clerk's office sorting through seemingly endless files. She has organized files and investigative trips; she does not hesitate to knock repeatedly on the doors of potentially hostile strangers. In short, Diane is willing to accept difficult and sometimes potentially uncomfortable tasks in an effort to find the truth and serve her clients. I have to rely heavily on her research, skills and judgment as I make decisions about how to move forward in our cases.

Diane also sought out additional opportunities and eagerly agreed to take part in an extra -clinic project, where she is culling through countless cases involving a particular
po lice-officer accused of misconduct. As part of the project, Diane is interviewing incarcerated individuals who were convicted based on investigations conducted by this officer.

During her time in the clinic, Diane has had the opportunity to speak with - in person and by phone - clients 1 lay witnesses, lawyers and court officers. She is the model of professionalism in every instance.
I am confident that Diane's talents and work ethic will serve her well as a clerk and a practitioner. She is not hesitant to seek guidance when appropriate, which is a valuable skill that not all my students and fellow practitioners possess. Once she becomes skilled in a particular area of investigation, research or litigation - which, in my experience, does not take long -- her judgment and work product are unquestionably reliable. And during her time with the clinic, Diane has been able to assist and lead fellow students on a similarly productive path.

It is with great pleasure that I offer my highest recommendation in support of Diane Philips's application. If you offer her the clerkship, I am confident that her work will exceed your expectations.

Please feel free to contact me if I can be of further assistance.

Sincerely,

Jennifer Givens - jenniferlgivens@law.virginia.edu - (434) 924-2912

Jennifer Givens

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PHILIPS WRITING SAMPLE

I drafted the following writing sample for a third-year seminar I took on the death penalty at the University of Virginia School of Law. The assignment asked us to address any aspect of modern-day death penalty law. My paper analyzes whether those who undergo the death penalty have a due process right to have members of the press present at their executions. I became interested in this topic when I read about a case that was pending in the Western District of Virginia in which a media organization sued for the right to be present at an execution on First Amendment grounds. The first part of my paper addresses why media organizations do not have such a First Amendment right. The second part, included here, shifts the focus to the rights of the inmate, an approach first suggested by Judge Berzon of the Ninth Circuit Court of Appeals.

WATCHDOGS IN THE EXECUTION CHAMBER:
IS THERE A DUE PROCESS RIGHT TO MEDIA SUPERVISION OF EXECUTIONS?

BY DIANE PHILIPS

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V. The Due Process Approach

The better approach to securing a right for press to view the entire execution process is founded in the death row inmate's Fourteenth Amendment procedural due process rights. This approach to a similar issue was briefly mentioned and endorsed in Judge Berzon's partial concurrence in a 2019 Ninth Circuit case, in which the court held that it violates the First Amendment for the state to prevent journalists from *hearing* all parts of an execution, [1] but it has not yet been explored in the literature or utilized in litigation. The argument put forth by the death row inmate bringing the claim would essentially be that by denying the media, and by extension the public, death penalty attorneys, and the courts, the opportunity to scrutinize all

[1] First Amendment Coal. of Ariz., Inc. v. Ryan, 938 F.3d 1069 (9th Cir. 2019) (Berzon, J., concurring in part and dissenting in part) ("Arizona's approach to devising, announcing, and recording its execution procedures denies condemned inmates their right under the Fourteenth Amendment to procedural due process of law." *Id.* at 1082). Judge Berzon suggests that one way for Arizona to remedy what is in her view a due process violation would be to provide "for public access to the pre-execution proceedings." *Id.* at 1085. *See also*, Villegas Lopez v. Brewer, 680 F.3d 1068 (9th Cir. 2012) (Berzon, J., concurring in part and dissenting in part) ("[O]ne way in which Arizona could provide a fair opportunity to challenge future executions conducted similarly—namely, by exposing to the public the actual impact of the procedures used and thereby permitting exposure through media and witnesses of any indications of serious pain during those executions.").

aspects of an execution, the state is depriving the inmate of the information he or she needs to effectively bring an Eighth Amendment challenge that the method of execution employed by the state is unconstitutionally cruel and unusual.

If the government is to deprive a citizen of life, liberty, or property, the citizen must be afforded due process of law, which includes "the opportunity to present reasons why the proposed action should not be taken" and the "right to present evidence" to support those reasons.[2] In the context of capital punishment, the state is taking from citizens the most sacred right of all, that of life, and as such the Court has recognized a right to due process in the death penalty context.[3] In *Mathews v. Eldridge*, the U.S. Supreme Court determined that the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[4] The Court outlined a three-factor balancing test for assessing procedural due process claims, which includes: 1) the importance of the private interest affected, 2) the risk of erroneous deprivation through the procedures used, and the probable value of any additional or substitute procedural safeguards, and 3) the importance of the state interest involved and the burdens that any additional or substitute procedural safeguards would impose on the state.[5] This section will evaluate whether a death row inmate's request that media

[2] These rights are outlined in "Some Kind of Hearing," an article that has been highly influential on the Court in which Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit lists ten essential procedural due process rights. Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975).
[3] *See Ford v. Wainwright*, 477 U.S. 399 (1986) ("Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being…. [C]onsistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate."). *Id.* at 411, 414.
[4] 424 U.S. 319 (1976).
[5] *Id.*

representatives be able to view every part of executions in the state in which he will be executed would meet this test.

A. The Importance of the Private Interest Affected

The first factor of the *Eldridge* test for procedural due process claims, the importance of the private interest affected, is clearly of the upmost importance in cases involving the deprivation of life by the government. The Supreme Court has time and time again emphatically recognized that "death is different" from other punishments imposed by the state because the outcome is irreversible.[6] Therefore, it is very likely that a court would weigh the first factor in the *Eldridge* balancing test strongly in favor of finding a procedural due process right.

B. The Risk of Erroneous Deprivation

The second prong of the test is the risk of erroneous deprivation through the procedures used, and the probable value of any additional or substitute procedural safeguards. In the context of capital punishment, this factor asks whether the procedures for challenging an execution present a risk that the condemned will face an "erroneous deprivation," which in this circumstance would refer to the loss of life in a manner that violates the Eighth Amendment. The Supreme Court has held that "punishments are cruel when they involve torture or a lingering death … something inhuman and barbarous, something more than the mere extinguishment of life."[7] The Court has also explained that "subjecting individuals to a risk of future harm—not

[6] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring) ("Death is a unique punishment"; "Death . . . is in a class by itself."); *id.* at 306 (Stewart, J., concurring) (The "penalty of death differs from all other forms of criminal punishment, not in degree but in kind."); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (The "penalty of death is different in kind from any other punishment."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (The "penalty of death is qualitatively different from a sentence of imprisonment, however long."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Death is "qualitatively different."); McCleskey v. Kemp, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) (It "hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death."); Ring v. Arizona, 536 U.S. 584, 605–06 (2002) (There is "no doubt that '[d]eath is different.'").

[7] In re Kemmler, 136 U.S. 436, 447 (1890).

simply actually inflicting pain—can qualify as cruel and unusual punishment."[8] To establish that such a risk violates the Eighth Amendment, however, the conditions presenting the risk must be "*sure or very likely* to cause serious illness and needless suffering," and give rise to "sufficiently *imminent* dangers."[9] Therefore, in order for courts to accurately evaluate whether such a risk exists, inmates need to have as much information as possible about how capital punishment is carried out, including whether the insertion of the intravenous lines is causing pain to the condemned.

The risk of erroneous deprivation of the Eighth Amendment right of freedom from cruel and unusual punishment is particularly high for prisoners facing execution by lethal injection due to the significant likelihood that the inmate will in fact experience substantial pain during the execution. Scholars estimate that over 7 percent of the executions conducted by means of lethal injection in United States through 2010 were botched.[10] One common issue that arises during executions is the inability of the executioners to find an adequate vein when inserting the intravenous lines. A particularly egregious instance of this occurred in 2018 during the attempted execution of Doyle Lee Hamm, in which executioners attempted for hours to locate a vein, stabbing him twelve times so that when they finally gave up, Hamm was "soaked with blood" and he urinated blood the next day.[11] Because this process is in many states shielded from view of execution witnesses such that the only observers are state employees and the inmate, who will not live to tell his story, inmates who will be executed in the future do not have access to

[8] Baze v. Rees, 553 U.S. 35, 49 (2008).
[9] Helling v. McKinney, 509 U.S. 25, 33 (1993).
[10] AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY, *Appendix A* (2014).
[11] Josh Rushing, *Death Penalty Reporter Sues Missouri In Bid to Witness Executions,* COLUMBIA JOURNALISM REVIEW, https://www.cjr.org/watchdog/missouri-lethal-injection.php (Aug. 21, 2018). This is just one of many incidents involving insertion of the intravenous lines. See Sarat, *supra* note 109, for a detailed list of botched executions.

information that would help them effectively bring a case to halt or modify their own executions.[12] This is particularly true in states like Virginia, which do not allow witnesses to even know how long the insertion of the intravenous lines takes in each execution.

Perhaps even more concerning than not allowing witnesses to watch the insertion of the intravenous lines is the practice of closing the curtains to witnesses when something goes wrong during the administration of the drugs. For example, during the 2014 execution of Clayton Lockett, executioners experienced significant difficulty in inserting the intravenous lines.[13] After the administration of the drugs started, Lockett started audibly groaning in pain and bucking against the restraints. When Lockett began to speak and the warden saw blood pooling near his groin, she told the witnesses, "We're going to lower the blinds temporarily."[14] Out of the view of the witnesses, executioners attempted to stop the botched execution and revive Lockett, but he died of a heart attack sometime during the ten minutes that the blinds were closed, more than forty minutes after the execution began.[15] The next day, Oklahoma Governor Mary Fallin said in her statement to the press, "The state lawfully carried out a sentence of death. Justice was served," reminded the public of the depravity of Lockett's crimes, and reassured them that

[12] *See* Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 883 (9th Cir. 2002) ("Because witnesses cannot see first-hand the manner in which the intravenous lines are injected, they will not be privy to any complications that may arise during this initial, invasive procedure. Consequently, the public will be forced to rely on the same prison officials who are responsible for administering the execution to disclose and provide information about any difficulties with the procedure.") One inmate in Virginia, Datrick Walker, used his last words to convey his concerns about the insertion of intravenous lines, stating, "I don't think y'all done this right, took y'all too long to hook it up. You can print that. That's it." Sarat, *supra* note 109, at 210. Not all inmates have this ability to share information about issues with their execution, though, since wardens may cut them off if they say something "offensive." Moreover, some states do not allow witnesses to hear the final words and still others do not even allow the inmate to make a final statement at all. *See generally*, Kevin F. O'Neill, *Muzzling Death Row Inmates: Applying the First Amendment to Regulations That Restrict a Condemned Prisoner's Last Words*, 33 ARIZONA STATE LAW JOURNAL 1159 (2001).

[13] Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/ (June 2015).

[14] *Id.*

[15] *Id.* "An investigation concluded that 'the viability of the IV access point was the single greatest factor that contributed to the difficulty in administering the execution drugs.'" Glossip v. Gross, 135 S. Ct. 2726, 2734 (2015).

"[e]xecution officials said Lockett remained unconscious after the lethal injection drugs were administered."[16] While media reports documented that Lockett's execution had been severely botched, they weren't able to share the full extent of his suffering with the public, raising the question of why states allow the media into the witness room at all if they won't be allowed to fully document the procedure. Because states pick and choose what the media can see by opening and closing the blinds or curtain at their own whim, journalistic accounts of executions are necessarily skewed in favor of the state.

Given the evidence of "torture" and "lingering death" that has been produced by media and witness reports under the current secrecy statutes, it is likely that further access to executions would yield enough disturbing information about the methods of execution in various states to support an Eighth Amendment challenge. For instance, in *Villegas Lopez v. Brewer*, the Ninth Circuit noted that the state of Arizona was "'perilously close' to falling outside of the constitutional safe harbor created by *Baze*" given how long it had taken to place the intravenous lines of Robert Towery in 2012.[17] If states were not able to hide the amount of time that setting the intravenous lines takes (and the pain that inmates suffer as a result) or drop the curtain when the execution begins to go badly, then it is very likely that courts would find it difficult to ignore the evidence of inhumanity in the execution methods employed by many states.

Disallowing media from viewing the entirety of executions could also hamper plaintiffs in bringing a *per se* challenge to the death penalty. The Court has repeatedly emphasized in its death penalty jurisprudence that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[18] When applying

[16] Konrad, *supra* note 29, at 19.
[17] Villegas Lopez v. Brewer, 680 F.3d 1068, 1075 (9th Cir. 2012). The siting of Towery's intravenous lines took almost an hour. *Id*.
[18] Trop v. Dulles, 356 U.S. 86, 101 (1958).

this standard, the Court looks to several indicators of social standards of decency, notably legislative trends among the states and jury sentencing practices, but ultimately these indicators are used as a proxy for public opinion.[19] Undoubtedly, one of the foremost considerations for members of the public in deciding whether to support the death penalty is the degree of pain experienced by those who are executed.[20] But, as Justice Marshall has pointed out, the public cannot have a fully informed view on the death penalty if they are not aware how it is being carried out.[21] In order for inmates to adequately present claims to the courts regarding the constitutionality of the death penalty and of particular execution methods, therefore, it is necessary for the public to have an accurate understanding of how capital punishment is carried out, including whether the insertion of the intravenous lines is causing pain to the condemned.

The state might argue that the same value could be served by following Tennessee's lead and allowing a representative from the state attorney general's office and the inmate's attorney to watch all parts of the execution. However, attorneys are not objective in the same way as the media and therefore any account given by either an attorney for the state or the inmate would inevitably be biased. According to the American Press Institute, "journalism's first obligation is to the truth."[22] The organization notes that while the journalist "is not and cannot be objective" because they inevitably have to make decisions about what and how to report, "journalistic

[19] Matthew C. Matusiak, *The Progression of "Evolving Standards of Decency" in U.S. Supreme Court Decisions*, 39 CRIMINAL JUSTICE REVIEW 253, 262 (2014).
[20] *See* Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 884 (9th Cir. 2002) ("Eyewitness media reports of the first lethal gas executions sparked public debate over this form of execution and the death penalty itself.").
[21] *See, e.g.,* Furman v. Georgia, 408 U.S. 238, 361 (Marshall, J., concurring) ("While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, its utility cannot be very great. This is because whether or not a punishment is cruel and unusual depends, not on whether its mere mention 'shocks the conscience and sense of justice of the people,' but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust and unacceptable.")
[22] AMERICAN PRESS INSTITUTE, *The Elements of Journalism*, https://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/elements-journalism/.

methods are objective."[23] By contrast, legal methods are not objective, but are based on advocating for the best outcome for one's client. Under Tennessee's method, courts are left with two accounts of the procedure that will likely conflict rather than the accounts of several media representatives who have no dog in the fight. Another problem with Tennessee's strategy is the issue of dissemination of information. It is much more likely that members of the public will learn of issues with an execution procedure if the media reports on them, a factor that is crucial given the importance of public opinion in Eighth Amendment jurisprudence, as outlined above.

C. THE IMPORTANCE OF THE STATE INTEREST INVOLVED

The final consideration in the *Eldridge* test is the importance of the state interest involved and the burdens that any additional or substitute procedural safeguards would impose on the state. States have argued that they have a legitimate governmental interest in "staff safety and institutional security"[24] and "carrying out the ordered execution, securing qualified personnel, [and] ensuring staff safety."[25] The central concern of states thus appears to be that allowing witnesses to see the establishment of the intravenous lines or to watch the executioners handling a crisis during the course of the execution would expose the identities of those involved. While maintaining the security of the prison and its officials is unquestionably a legitimate penological interest, the state's reasoning does not seem to hold much weight under examination.

First, alleged fears of retaliation against those involved in executions are overblown. For example, the Ninth Circuit in the *Woodford* case found that "[n]o execution team member has ever been threatened or harmed by an inmate or by anyone outside the prison because of his

[23] *Id. See also* ETHICAL JOURNALISM NETWORK, *The 5 Principles of Ethical Journalism*, https://ethicaljournalismnetwork.org/who-we-are/5-principles-of-journalism (describing the "five core principles of journalism": truth and accuracy, independence, fairness and impartiality, humanity, and accountability).
[24] *Woodford*, 299 F.3d at 880.
[25] Oklahoma Observer v. Patton, 73 F. Supp. 3d 1318, 1330 (D. Okla. 2014).

participation in an execution" in the entire state of California.[26] The court also noted that there are several people who play critical roles in the capital punishment process, including the warden, the governor, and judges, but there was no evidence that even they had faced any threat due to their involvement with the death penalty.[27] Second, execution team members can still conceal their identities during the execution procedure. The use of surgical garb to cover the face and body is "a practical alternative to restricting access to witness lethal injection executions in order to conceal the identity of such execution staff should security concerns warrant such concealment."[28] A surgeon who testified for the plaintiffs in the *Woodford* trial stated that wearing surgical garb did not impact her ability to communicate with her team or deliver medical care, including inserting intravenous lines.[29] Thus, allowing the witnesses to see all parts of an execution would not place any additional burden on the state and would serve to protect the crucial procedural due process interests of death penalty inmates.

VI. CONCLUSION

It is integral to the proper administration of the death penalty that courts and the public have some means of learning about issues that occur during executions. While states may assert that their efforts to conceal the most sensitive parts of the execution process from witnesses are justified by a need to maintain the anonymity of those involved, it is far more likely that they are motivated by a desire to hide the truth about the brutality of the death penalty from the public. Unfortunately, the U.S. Supreme Court's current test for the First Amendment right of the media to access governmental procedures probably would not require states to allow media to watch the entire execution, given that it extends the right only to areas that have historically been open to

[26] *Woodford*, 299 F.3d at 882.
[27] *Id.*
[28] *Id.* at 884.
[29] *Id.* at 882.

the press and general public. As a result, it would be a better use of resources for media organizations to work with death penalty advocates to reframe the issue. This paper has argued that an alternative method of effectively obtaining such a guarantee is for inmates who seek to challenge the method of execution in the state in which they will be executed to bring a procedural due process claim that preventing witnesses from watching the entirety of the execution unconstitutionally precludes them from gathering evidence necessary to inform the court about the risk that they will suffer cruel and unusual punishment. Such an argument is consistent with the Court's repeated insistence that "death is different" from other sentences and capital punishment should therefore be held to the highest standards of procedural due process.

Applicant Details

First Name	**Hugh**
Last Name	**Phillips**
Citizenship Status	**U. S. Citizen**
Email Address	**hphillips13@liberty.edu**
Address	**Address** **Street** **120 Portico Street, Apt. 207, Apt 207** **City** **Lynchburg** **State/Territory** **Virginia** **Zip** **24502** **Country** **United States**
Contact Phone Number	**4084556833**

Applicant Education

BA/BS From	**Liberty University**
Date of BA/BS	**May 2019**
JD/LLB From	**Liberty University School of Law** **http://law.liberty.edu/**
Date of JD/LLB	**May 15, 2022**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Liberty Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Liberty Law Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Hugh C. Phillips

120 Portico St., Apt 207 | 408-455-6833 | hphillips13@liberty.edu

6/12/2021

Dear Hiring Coordinator,

As a new attorney and graduate of Liberty University School of Law, I believe I am uniquely qualified for this clerkship. I believe the skills I have developed throughout law school and my prior clerking experience make me the best candidate for this job.

If selected for this clerkship, I bring practice ready legal research and writing skills and a team-oriented attitude. As a law clerk for Chief Justice Parker during the summer of 2021, I quickly learned that coherent and concise legal writing as well as the ability to analyze complex legal issues are necessary in a good law clerk. I further honed these skills when I clerked for the Alabama Solicitor General's Office and aided in drafting briefs to appellate courts. Liberty University School of Law's unique lawyering skills program and my tenure as Chairman of Liberty's Moot Court Board and as a senior staff editor on Liberty Law Review have allowed me to refine/temper/polish these skills. I also have appellate litigation experience as a law clerk for Americans United for Life. Working for AUL, I participated in legal work surrounding two cases of federal litigation heard by the Supreme Court of the United States. Additionally, I have striven to grow as a leader by participating in law school student organizations. I am an officer in the Federalist Society and our Law Students for Life chapter, and as a result have developed organizational and administrative skills. These have helped me to learn how to delegate effectively and motivate my peers to work as a team and accomplish common goals.

I would count it the greatest honor to aid your office. Thank you for considering my application.

Sincerely,

Hugh C. Phillips

Hugh Carleton Phillips

LIBERTY UNIVERSITY | SCHOOL of LAW

Hugh C. Phillips

120 Portico Street, Apt. 207 Lynchburg, VA 24502 | 408-455-6833 | hphillips13@liberty.edu |

Education

JURIS DOCTORATE | ANTICIPATED SPRING 2022 | LIBERTY UNIV. SCHOOL OF LAW, VA

- Liberty Law Review Senior Staff
- Chairman, Moot Court Board & external Moot Court ABA competition staff.

B.S. IN GOVERNMENT: PRE-LAW| 2019 | LIBERTY UNIVERSITY, VA

- GPA: 4.0, Graduated Summa Cum Laude, Outstanding Academic Achievement Award.
- Liberty University Dean's list: Fall 2017, Spring 2018, Summer 2018.

Law School Awards

- 2L Deans List, Fall 2020 Semester
- Champion, Spring 2020 1L Moot Court Tournament: Stream of Commerce litigation.
- Champion, Fall 2020 2L/3L Moot Court Tournament: 4th Amendment search litigation.

Work Experience

SUMMER LAW CLERK | SUPREME COURT OF ALABAMA |ACCEPTED FOR SUMMER 2021| FULLTIME FOR 6 WEEKS

- Accepted to serve as a summer law clerk for Chief Justice Tom Parker.

SUMMER INTERN | ALABAMA ATTORNEY GENERAL'S OFFICE | ACCEPTED FOR SUMMER 2021| FULLTIME FOR 6 WEEKS

- Accepted to serve as an intern for the Alabama Attorney General's office.

SUMMER ASSOCIATE | AMERICANS UNITED FOR LIFE SENIOR COUNSEL'S OFFICE | JUNE. 2020 – AUG. 2020| WASHINGTON, DC (REMOTE) | FULLTIME.

- Assisted in work surrounding the Supreme Court's *June Medical* litigation.
- Researched for senior staff regarding ongoing Federal appellate litigation.
- Conducted in-depth research on State and Federal precedent surrounding stare decisis and reliance interests.
- Served as the Senior Counsel's research assistant for the writing of several law review articles.
- Collaborated with staff on policy projects regarding pending and suggested federal administrative regulations.

GOVERNMENT AFFAIRS/ POLICY INTERN | FAMILY RESEARCH COUNCIL | JAN. 2019- AUG. 2019 | FULL TIME.

- Writing blog posts and internal research memoranda on the legal precedent and legislative history of pro-life legislation and made recommendations on how to proceed.
- Read, briefed, and tracked nearly 500 pieces of active state and federal legislation regarding family values. This meant reading the bills themselves, going to committee meetings, calling legislative offices for updates, and conducting strategic research efforts to determine bill statuses.
- Met with congressional caucus and legislative staff in the effort to facilitate passage of pro-family policies.

Academic Transcript

L28896457 Hugh Phillips
Jun 13, 2021 04:41 pm

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Institution Credit Transcript Totals Courses in Progress

Transcript Data

STUDENT INFORMATION

Name : Hugh Phillips
Birth Date: Dec 19, 1997

Curriculum Information

Current Program
Juris Doctor
Major and Department: Juris Doctorate, School of Law

***Transcript type:WEB LU Unofficial Web Transcript is NOT Official ***

INSTITUTION CREDIT **-Top-**

Term: Fall 2019
Academic Standing:

Subject	Course Level	Title	Grade	Credit	Quality	Start and	R

					Hours	Points	End Dates
LAW	501	JD	Foundations of Law	B+	2.000	6.66	
LAW	505	JD	Contracts I	A	3.000	12.00	
LAW	511	JD	Torts I	B	3.000	9.00	
LAW	515	JD	Property I	B-	2.000	5.34	
LAW	521	JD	Civil Procedure I	B	3.000	9.00	
LAW	525	JD	Lawyering Skills I	B-	2.000	5.34	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	47.34	3.15
Cumulative:	15.000	15.000	15.000	15.000	47.34	3.15

Unofficial Transcript

Term: Spring 2020

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	506	JD	Contracts II	P	3.000	0.00		
LAW	512	JD	Torts II	P	2.000	0.00		
LAW	516	JD	Property II	P	3.000	0.00		
LAW	522	JD	Civil Procedure II	P	2.000	0.00		
LAW	526	JD	Lawyering Skills II	A	1.000	4.00		
LAW	526	JD	Lawyering Skills II	P	2.000	0.00		
LAW	535	JD	Criminal Law	P	3.000	0.00		

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	1.000	4.00	4.00
Cumulative:	31.000	31.000	31.000	16.000	51.34	3.20

Unofficial Transcript

Term: Summer 2020

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	565	JD	Professional Responsibility	A	2.000	8.00		

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	2.000	2.000	2.000	2.000	8.00	4.00
Cumulative:	33.000	33.000	33.000	18.000	59.34	3.29

Unofficial Transcript

Term: Fall 2020

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	531	JD	Constitutional Law I	A-	3.000	11.01		
LAW	545	JD	Evidence	B+	3.000	9.99		
LAW	561	JD	Business Associations	B	4.000	12.00		
LAW	571	JD	Lawyering Skills III	A	2.000	8.00		
LAW	831	JD	Appellate Advocacy	A	2.000	8.00		
LAW	881	JD	Law Review Candidacy	P	1.000	0.00		

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	49.00	3.50
Cumulative:	48.000	48.000	48.000	32.000	108.34	3.38

Unofficial Transcript

Term: Spring 2021

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	532	JD	Constitutional Law II	B-	3.000	8.01		
LAW	541	JD	Criminal Procedure	C+	3.000	6.99		
LAW	572	JD	Lawyering Skills IV	B	2.000	6.00		
LAW	580	JD	Statutory Interpretation	A	1.000	4.00		
LAW	591	JD	Taxation of Individuals	C	3.000	6.00		
LAW	832	JD	Advanced Appellate Advocacy	P	1.000	0.00		
LAW	882	JD	Law Review Junior Staff	P	1.000	0.00		

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	12.000	31.00	2.58
Cumulative:	62.000	62.000	62.000	44.000	139.34	3.16

Unofficial Transcript

TRANSCRIPT TOTALS (LAW SCHOOL) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	62.000	62.000	62.000	44.000	139.34	3.16
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	62.000	62.000	62.000	44.000	139.34	3.16

Unofficial Transcript

COURSES IN PROGRESS -Top-

Term: Summer 2021

Subject	Course	Level	Title	Credit Hours	Start and End Dates
LAW	863	JD	Judicial Clerkship Externship	2.000	

Unofficial Transcript

Term: Fall 2021

Subject	Course	Level	Title	Credit Hours	Start and End Dates
LAW	575	JD	Wills, Trusts, and Estates	3.000	
LAW	595	JD	Law Skills V - Trial Advocacy	3.000	
LAW	705	JD	1st Amendment Seminar	2.000	
LAW	721	JD	State and Local Government	3.000	
LAW	804	JD	Virginia Criminal Procedure	1.000	
LAW	851	JD	Constitutional Litigation Clin	2.000	

Unofficial Transcript

RELEASE: 8.7.1

Academic Transcript

L28896457 Hugh Phillips
Mar 19, 2021 01:32 pm

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Transfer Credit Institution Credit Transcript Totals

Transcript Data

STUDENT INFORMATION

Name : Hugh Phillips
Birth Date: Dec 19, 1997

Curriculum Information

Current Program
Bachelor of Science
Major and Department: Government: Pre-Law, Government

***Transcript type:WEB LU Unofficial Web Transcript is NOT Official ***

DEGREE AWARDED

Awarded: Bachelor of Science **Degree Date:** May 11, 2019
Institutional Honors: Summa Cum Laude

Curriculum Information

Primary Degree
Major: Government: Pre-Law

TRANSFER CREDIT ACCEPTED BY INSTITUTION -Top-

201720: Gavilan College

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
CLST	1XX	College Learn Elect-Lower Lev	P	2.000		0.00
ENGL	101	Composition & Rhetoric	P	3.000		0.00
GOVT	220	American Government	P	3.000		0.00
HIUS	221	Survey of American History I	P	3.000		0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	11.000	11.000	11.000	0.000	0.00	0.00

Unofficial Transcript

201740: Gavilan College

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
ETHC	101	Introduction to Ethics	P	3.000		0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	3.000	3.000	3.000	0.000	0.00	0.00

Unofficial Transcript

201820: Gavilan College

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
ECON	214	Principles of Macroeconomics	P	3.000		0.00
GOVT	480	Terrorism	P	3.000		0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	6.000	6.000	6.000	0.000	0.00	0.00

Unofficial Transcript

201830: Gavilan College

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
COMS	101	Speech Communication	P	3.000		0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	3.000	3.000	3.000	0.000	0.00	0.00

Unofficial Transcript

201840: Gavilan College

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
ENGL	102	Composition and Literature	P	3.000		0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA

Current Term:	3.000	3.000	3.000	0.000	0.00	0.00

Unofficial Transcript

Test Score: CLEP

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
HIUS	222	Survey of American History II	P	3.000		0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	3.000	3.000	3.000	0.000	0.00	0.00

Unofficial Transcript

201820: CLEP

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
HIEU	201	Hist of Western Civilization I	P	3.000		0.00
HIEU	202	Hist of Western Civilizatn II	P	3.000		0.00
SOCI	200	Introduction to Sociology	P	3.000		0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	9.000	9.000	9.000	0.000	0.00	0.00

Unofficial Transcript

INSTITUTION CREDIT **-Top-**

Term: Summer 2017

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
APOL	104	UG	Contemporary Worldviews	A	3.000	12.00		
UNIV	104	UG	Instr Tech for Online Learning	A	3.000	12.00		

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	6.000	6.000	6.000	6.000	24.00	4.00
Cumulative:	6.000	6.000	6.000	6.000	24.00	4.00

Unofficial Transcript

Term: Fall 2017

Academic Standing: Good Standing

Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
BIBL	104	UG	Survey of Old & New Testament	A	4.000	16.00		
BIOL	101	UG	Principles of Biology	A	3.000	12.00		
CSTU	101	UG	Western Culture	A	3.000	12.00		
THEO	104	UG	Introductn to Theology Survey	A	4.000	16.00		

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	14.000	56.00	4.00
Cumulative:	20.000	20.000	20.000	20.000	80.00	4.00

Unofficial Transcript

Term: Spring 2018

Academic Standing: Good Standing
Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
CJUS	200	UG	Intro to Criminal Justice	A	3.000	12.00		
GOVT	200	UG	Constitutional Govt & Free Ent	A	3.000	12.00		
GOVT	329	UG	American Exceptionalism	A	3.000	12.00		
GOVT	421	UG	American Constitutional Histor	A	3.000	12.00		
MATH	201	UG	Intro. to Probability & Statis	A	3.000	12.00		
PHIL	201	UG	Philosophy & Contemporary Idea	A	3.000	12.00		

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	18.000	18.000	18.000	18.000	72.00	4.00
Cumulative:	38.000	38.000	38.000	38.000	152.00	4.00

Unofficial Transcript

Term: Summer 2018

Academic Standing: Good Standing
Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
CJUS	230	UG	Criminal Justice Writing & Res	A	3.000	12.00		
GOVT	215	UG	Logic & Legal Reasoning	A	3.000	12.00		
GOVT	345	UG	Jurisprudence	A	3.000	12.00		
GOVT	346	UG	Legal Research & Writing	A	3.000	12.00		
GOVT	350	UG	Political Econ & Public Policy	A	3.000	12.00		
GOVT	490	UG	Political Theory	A	3.000	12.00		

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	18.000	18.000	18.000	18.000	72.00	4.00
Cumulative:	56.000	56.000	56.000	56.000	224.00	4.00

Unofficial Transcript

Term: Fall 2018

Academic Standing: Good Standing
Additional Standing: Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
CJUS	330	UG	Judicial Process	A	3.000	12.00		
CJUS	400	UG	Criminal Law	A	3.000	12.00		
CJUS	410	UG	Constitutional Criminal Proced	A	3.000	12.00		
GOVT	280	UG	Undergraduate Torts	A	3.000	12.00		
GOVT	330	UG	Intro to Comparative Politics	A	3.000	12.00		
GOVT	425	UG	American Foreign Policy	A	3.000	12.00		

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	18.000	18.000	18.000	18.000	72.00	4.00
Cumulative:	74.000	74.000	74.000	74.000	296.00	4.00

Unofficial Transcript

Term: Spring 2019

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
GOVT	422	UG	American Constitutional Law	A	3.000	12.00		
GOVT	476	UG	Persuasive Argumentation Lawye	A	3.000	12.00		
GOVT	492	UG	Senior Seminar	A	3.000	12.00		

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	9.000	9.000	9.000	9.000	36.00	4.00
Cumulative:	83.000	83.000	83.000	83.000	332.00	4.00

Unofficial Transcript

TRANSCRIPT TOTALS (UNDERGRADUATE) **-Top-**

Level Comments: Degree Awarded Bachelor of Science Degree Awarded GPA 4.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	83.000	83.000	83.000	83.000	332.00	4.00
Total Transfer:	38.000	38.000	38.000	0.000	0.00	0.00
Overall:	121.000	121.000	121.000	83.000	332.00	4.00

Unofficial Transcript

RELEASE: 8.7.1

June 22, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I recommend Hugh Phillips to you without reservation. I have known Mr. Phillips for two years. During that time, I have had the opportunity to regularly interact with him, particularly during the long hours of preparation for a national moot court competition. He is a strong analytical thinker and is very thoughtful and hard-working. He also has a delightful personality that would be a great additional to your chambers.

As his resume reflects, he has done very well in law school. He also serves on the Liberty University Law Review and is a moot court competitor. He was recently elected to serve as the President of the Moot Court Board for this upcoming academic year. I serve as a coach to the moot court teams and have spent a great deal of time observing his interactions with peers, discussing his life plans, and watching him develop into a very skilled oral advocate. Mr. Phillips is well-liked by his peers and faculty at the law school.

Writing this letter was a challenge because it is hard to put into words what a great candidate he is. But, I place him among the top students I have encountered during the sixteen years I have taught at Liberty Law. I have no doubt he will be an excellent judicial law clerk, will fit into any office dynamics, and will always be eager to learn and do more to develop his legal skills.

I encourage you to strongly consider Mr. Phillips for a clerkship. If you have any questions about him, I welcome the opportunity to speak further about this fine, young man.

Respectfully,

Professor Rena Lindevaldsen

(434) 592-5300

June 15, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing in reference to Mr. Hugh Phillips. I understand that Mr. Phillips is applying for a clerkship with your office and I write to give him an unqualified endorsement.

During his time in law school, Mr. Phillips has distinguished himself as a class leader. Furthermore, he has demonstrated a commitment to the study and practice of law that few of his classmates can rival.

I have had the pleasure of teaching Mr. Phillips in the Lawyering Skills program, in a large lecture class for Professional Responsibility, and in a small section for Appellate Advocacy. He excelled in all environments. During each of his Lawyering Skills exercises, Mr. Phillips displayed a desire to learn the law and apply it in real life situations. He demonstrated exceptional ability in research, writing, and analysis, which allowed him to earn the highest grade in Appellate Advocacy during his 2L year.

Additionally, I serve as the Director of our Moot Court program and have had the pleasure of coaching Mr. Phillips in preparation for his participation on one of our national teams. He has already been selected to compete again this fall, and will undoubtedly compete again in the spring as part of our ABA National Appellate Advocacy Competition team. He has excelled in Moot Court, both in written and oral advocacy. This spring, his peers elected Hugh to serve as Chairman of the Moot Court Board for the upcoming year.

In addition to his time on Moot Court, Mr. Phillips is a senior staff member on law review, serves as president of two other student groups, and has a GPA of 3.16. He is intelligent, enthusiastic, dedicated, and personable.

During the summer of 2021, Hugh will be splitting his time between the Supreme Court of Alabama, with Chief Justice Tom Parker, and the Alabama Attorney General's office.

I hope that you will give Mr. Phillips the consideration that he deserves and afford him what will undoubtedly be the beginning of a very successful legal career. Should you need any further information please feel free to contact me.

Sincerely,

Scott Thompson
Director of the Center for Lawyering Skills
Liberty University School of Law
1971 University Blvd.
Lynchburg, VA 24502
434.592.5384
sethompson@liberty.edu

LAW REVIEW CASE NOTE SUBMISSION

Additional Powers and Duties of Governor During Declared Emergency, S.C. Code ANN. § 25-1-4402

S.C. CODE § 25-1-440 AND THE PREEMPTION OF LOCAL EMERGENCY POWERS

I. INTRODUCTION

With the COVID-19 pandemic sweeping the nation, state and local emergency powers statutes are being put to the test. In South Carolina, Governor Henry McMaster, attempting to coordinate the State's response to the health emergency, activated the emergency powers granted him by state law to declare a state of emergency and later, institute a statewide stay at home order.[1] In doing so, the Governor cited to S.C. Code Section 25-1-440 as statutory authority for his exercise of such broad powers.[2]

However, with the rise of Coronavirus, many local and municipal governments decided to act independently of the Governor and issued separate and stricter stay at home orders and restrictions in the attempt to "flatten the curve."[3] In response, the South Carolina Attorney General's Office issued a written opinion arguing that under South Carolina law, specifically section 25-1-440, the Governor's proclamations "preempt" local emergency declarations.[4] Despite this opinion, municipalities have continued to enforce their own emergency declarations and stay at home orders and, as this crisis unfolds and the State prepares for a possible resurgence of COVID-19 in the coming months, the question of whether Section 25-1-440

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1 Gov. McMaster Exec. Order No. 2020-15, *State of Emergency Due to COVID-19 Pandemic* (S.C. 2020), https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-28%20FILED%20Executive%20Order%20No.%202020-15%20-%20State%20of%20Emergency%20Due%20to%20COVID-19%20Pandemic.pdf; Gov. McMaster Exec. Order No. 2020-21, *Home or Work Order* (S.C. 2020), https://governor.sc.gov/sites/default /files/Documents/Executive-Orders/2020-04-06%20FILED%20Executive%20 Order%20No.%202020-21%20-%20Stay %20at%20Home%20or%20Work%20Order%20Due%20to%20COVID-19.pdf.

2 Gov. McMaster Exec. Order No. 2020-15, *supra* note 1, at 3-5.

3 Columbia, S.C., Ordinance 2020-034 (Mar. 26, 2020), https://www.columbiasc.net/uploads/headlines/03-26-2020/city-councilshares-draft-ordinance/2020-034%20Stay%20Home%20Stay%20Safe.pdf.

4 S.C. Att'y Gen., Updated Opinion with Additional Citations Concerning the Extraordinary Powers of the Governor During a State of Emergency 3 (Mar 29, 2020), http://www.scag.gov/wp-content/uploads/2020/03/COVID-opinion-on-extraordinary-powers-with-additional-citations-02245943xD2C78.pdf.

grants the Governor preemptive authority over municipal emergency declarations may become the subject of much controversy and even litigation.[5]

This statute note will examine the conflict between state and local authorities as to the proper interpretation of Section 25-1-440's grant of emergency powers to the Governor.[6] First, both interpretations will be overviewed. Then, using traditional principles of statutory interpretation and an analysis of South Carolina law, Section 25-1-440 will be examined to conclude that the Governor's authority is supreme in a state of emergency and supersedes local emergency declarations.

II. MAIN CASE

When Governor Henry McMaster first declared a state of emergency on March 13th, 2020 due to COVID-19, he activated extensive emergency powers under Section 25-1-440 of the South Carolina Code, among other statutes.[7] In this original emergency declaration, Governor McMaster freed extensive funding for emergency use, activated the National Guard, and closed schools statewide, among other measures.[8] These measures were soon followed by successive orders closing nonessential businesses across the state.[9] However, it was not until April 6th, 2020 that Governor McMaster issued a statewide stay at home order requiring citizens of South Carolina to abide by social distancing protocols and only leave their homes for "[e]ssential [a]ctivities."[10]

Yet, while Governor McMaster was initiating a statewide response to the COVID-19 pandemic, many municipalities, concerned with the Governor's pace in responding, issued their own stay at home orders and emergency regulations well before the Governor acted. On March 26th, the City of Columbia

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5 The timeliness of this subject is demonstrated by the dozens of lawsuits filed, across the Union, challenging the extent of state executive authority in periods of national or state emergency.

6 S.C. CODE ANN. § 25-1-440.

7 *See* Gov. McMaster Exec. Order No. 2020-15, *supra* note 1.

8 *Id.* at 7-9.

9 Gov. McMaster Exec. Order No. 2020-17, *Closure of Nonessential Businesses* (S.C. 2020), https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-0331%20FILED%20Executive%20Order%20No.%202020-17%20-%20Closure%20of%20Non-Essential%20Businesses.pdf; Gov. McMaster Exec. Order No. 2020-18, Closure of Additional Nonessential Businesses (S.C. 2020), https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-04-03%20FILED%20Executive%20Order%20No.%202020-18%20%20Closure%20of%20Additional%20Non-Essential%20Businesses.pdf.

10 Gov. McMaster Exec. Order No. 2020-21, *supra* note 2, at 7.

passed a stay at home ordinance requiring all citizens to remain in their homes and practice social distancing.[11] The City of Charleston followed soon after, enacting a stay at home order on April 1st.[12] On April 3rd the City of Greenville also issued a stay at home order further regulating essential businesses to prevent disease spread and "urging the Governor to issue a statewide executive order requiring citizens to stay at home."[13]

In response to these actions and prior to Governor McMaster's institution of a statewide stay at home order, the South Carolina Attorney General's office issued a written opinion arguing that Section 25-1-440 only grants "extraordinary emergency powers" to the Governor and local governments do not possess these emergency powers.[14] The opinion argued that local emergency orders, such as the City of Columbia's stay at home order, were illegal because they conflicted with authority that had been vested solely in the Governor and that city ordinances making an activity unlawful which the Governor's emergency order had allowed would be a violation of article VIII, section 14(5) of the South Carolina Constitution.[15] Because of this exclusive statutory grant of power to the Governor, the Attorney General's office argued, local orders regulating COVID-19 response would be "preempted" by the Governor's emergency orders.[16]

Municipal governments across the state pushed back on this opinion. Local leaders, such as Columbia Mayor Steven Benjamin argued that the South Carolina *Home Rule Act* gave municipal governments the authority to enact such emergency measures and take any steps they deemed necessary to protect their citizens.[17] Mayor Benjamin led other local leaders in arguing that the Attorney General's office had misinterpreted Section 25-1-440 and other relevant statutes and that the stay at home orders and emergency regulations of Columbia and other cities were lawful and would be enforced.[18]

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11 Columbia, S.C., Ordinance 2020-034, *supra* note 4.
12 Charleston, S.C., Ordinance 2020-048 (Apr. 1, 2020), https://www.charleston-sc.gov/DocumentCenter/View/26251/Emergency-Ordinance-Stay-at-Home.
13 Greenville, S.C., Ordinance 2020-36 (Apr. 3, 2020), https://www.greenvillesc.gov/DocumentCenter/View/15477/Emergency-Ordinance---Coronavirus---Social-Distancing---April-3-2020-PDF.
14 S.C. Att'y Gen., Opinion Letter (Mar. 29, 2020), *supra* note 5 at 1-3.
15 *Id.* at 1-4.
16 *Id.* at 2-4.
17 Greg Hadley, *Benjamin Says Columbia Plans to Move Ahead with Coronavirus 'Stay at Home' Order*. The State, Mar. 28, 2020, https://www.thestate.com/news/coronavirus/article241588111.html.
18 Mayor Steven Benjamin (@SteveBenjaminSC), TWITTER, (Mar. 28, 2020, 12:19 PM), https://twitter.com/SteveBenjaminSC/status/1243935844639084545.

Yet, the Attorney General's office, while acknowledging that "a local ordinance . . . is presumed to be constitutional,"[19] continued to maintain that local stay at home orders and other emergency edicts were beyond the realm of local authority and preempted by the Governor's executive orders.[20] Thus, tension currently exists in South Carolina law over whether Section 25-1-440 grants the Governor exclusive use of special emergency powers or whether, due to home rule, these powers are shared by localities. With COVID-19 expected to break out again in force later this year, the question of who has ultimate emergency authority to direct the State's response to this deadly disease is of critical importance.

III. ANALYSIS

South Carolina Code Section 25-1-440 is best interpreted as granting the Governor overarching and preemptive authority during a state of emergency. In considering this interpretation, traditional doctrines of statutory construction will be used. First, the statute will be examined to determine it's plain and ordinary meaning, then the legislature's intent as to the wielding of emergency powers will be surveyed, and finally, the statute's meaning will be examined in light of South Carolina's system of home rule.

A. The Text of the Statute in the Interpretation of S.C. Code § 25-1-440 Considered

Generally, when proceeding with the task of statutory construction, most legal scholars propose first looking directly at the text of the statute in order to interpret its meaning.[21] Then, if the text itself still possesses ambiguity, the interpreter is to analyze the intent of the legislature in writing the statute.[22] This framework will be followed in analyzing Section 25-1-440. South Carolina courts have also provided guidance on the construction of state statutes. The Supreme Court of South Carolina has noted:

> It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the legislature. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore,

[19] S.C. Att'y Gen., Opinion Letter (Mar. 29, 2020), *supra* note 5 at 3-4 (citing Whaley v. Dorchester Cty. Zoning Bd. of App., 524, S.E.2d 404, 408 (1999).
[20] S.C. Att'y Gen., Opinion Letter (Mar. 29, 2020), *supra* note 5 at 2-4.
[21] Morrell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation.* 30 J. Legis. 1, 6-9 (2003) (providing an overview of the basic principles of statutory construction).
[22] *Id.* at 9-12.

> in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. [23]

Thus, in analyzing Section 25-1-440, the plain and ordinary meaning of the text is first considered to determine whether the Governor is given supreme and indivisible powers during a statewide emergency.

Section 25-1-440 gives the Governor broad powers during a declared emergency. However, the statute's preamble provides noteworthy insight into the law's purpose. The preamble delegates the duty of protecting the State solely to the Governor, noting that "as the elected Chief Executive of the State, [the Governor] is responsible for the safety, security, and welfare of the State."[24]

The statute's text then proceeds to list the powers granted to the Governor to fulfill this mandate during a state of emergency.[25] The Statute gives the governor the authority to declare and "amend or rescind" emergency proclamations, proclaim emergencies, suspend regulatory rules, and direct the "resources" and operations of executive agencies as he wishes to respond to emergencies.[26] It also gives the Governor authority to effectuate evacuations from affected areas, work with the federal government on disaster response, develop and coordinate state emergency management, authorize curfew exceptions, respond effectively during a public health emergency through implementation of the *Emergency Health Powers Act*, and provides criminal penalties for failed compliance with executive orders.[27] Finally, the statute allows the Governor to force local governments to abide by and implement the Governor's emergency measures.[28]

A purely textualist examination of the statute shows that the statute is composed as a prescription of the Governor's authority to exercise enumerated emergency powers and a catalog of the powers granted.[29] Furthermore, the statute expressly grants authority only to the Governor, and no other.[30] One

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[23] State v. Blackmon, 403 S.E.2d 660, 662 (1991) (first citing First South Savings Bank, Inc. v. Gold Coast Assoc., 390 S.E.2d 486 (Ct. App. 1990); then citing Bryant v. City of Charleston, 368 S.E.2d 899 (1988)).
[24] S.C. CODE ANN. § 25-1-440(A).
[25] S.C. CODE ANN. § 25-1-440.
[26] *Id.* § 25-1-440(A)(1-5).
[27] *Id.* § 25-1-440(A)-(C).
[28] *Id.* § 25-1-440(A)(6).
[29] *Id.* § 25-1-440.
[30] *Id.*

canon of statutory construction, *expressio unius est exclusio alterius* (where one thing is mentioned, all others are excluded) provides insight here. Because the statute only expressly grants the Governor authority, this canon implies, as a rule of interpretation, that the statute does not intend to confer authority on any other government official. Thus, for local governments to argue that they have authority to move beyond general police powers and exercise special emergency powers like those enumerated in Section 25-1-440 they must, at best, claim either an inherent right to exercise these powers or argue that Section 25-1-440 grants them these powers by implication.

While the question of whether home rule grants local governments an inherent right to exercise special emergency powers will be addressed in part C, Section (A)(6) of the statute provides insight on whether local governments may exercise the enumerated powers by implication. Section (A)(6) expressly grants the Governor the ability to force local governments to comply with his executive orders and emergency response plan. [31] It notes that the Governor may "compel performance by elected and appointed state, county, and municipal officials and employees of the emergency duties and functions assigned them in the State Emergency Plan or by Executive Order."[32] This authority to direct the actions of local governments in times of emergency suggests that the Legislature intended the Governor's exercise of emergency powers to be supreme over local measures.[33]

As a whole, the plain and ordinary meaning of Section 25-1-440 suggests that the statute grants the Governor, and only the Governor, expressed authority to exercise enumerated "additional" emergency powers during a state-wide emergency and that these powers arrogate local emergency efforts.[34] Local authority to make use of special emergency powers can neither be drawn from the expressed language of the text nor implied from its plain and ordinary meaning. Although not conclusive, the text of the statute suggests a centralized and uniform use of special emergency powers with authority vested solely in the governor.

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31 S.C. CODE ANN. § 25-1-440(A)(6).
32 *Id.*
33 *Id.*
34 S.C. CODE ANN. § 25-1-440.

B. Legislative Intent in the Interpretation of S.C. Code § 25-1-440 Considered

Yet, when interpreting a statute according to the text, if the text does not clearly answer the question, the intent of the Legislature is consulted to attempt to resolve the ambiguity in the application of the statute. Although the emergency powers statute expressly grants authority to the Governor, it, admittedly, does not do so exclusively.[35] Thus, while the text's express provisions point to an exclusive use of special emergency authority by the Governor,[36] other possible reasonable interpretations of the statute mandate that the intent of the South Carolina Legislature in formulating the statute be considered.[37]

The general intent of the Legislature in drafting Section 25-1-440 was to provide the Governor with the ability and authority to protect the "safety, security, and welfare of the State."[38] Enacted in 1979, and periodically revised, one of the latest revisions was the 2001 *South Carolina Homeland Security Act* which revealed that the Code's purpose was "to ensure the safety of the citizens of South Carolina" during emergencies.[39] The Legislature sought to accomplish this goal by granting the Governor additional authority to direct the State's response by allowing him to utilize "[l]ocal officers and employees" to implement a state-wide response during a "public health emergency."[40] This suggests a legislative belief that centralizing special emergency response powers in the Governor's hands during state-wide emergencies would best protect the people of South Carolina.

This intention is also manifested through application of the State's implied preemption doctrine. The Supreme Court of South Carolina has noted that "[i]mplied field preemption occurs 'when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity.'"[41] In this case, the statutory scheme, not only grants to the Governor the duty to protect and respond to statewide emergencies, but provides the Executive with broad

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35 *Id.*
36 *Id.*
37 *Blackmon*, 403 S.E.2d at 662 (1991) (citing *First South Savings Bank, Inc.*, 390 S.E.2d at 486 (Ct. App. 1990)).
38 S.C. CODE ANN. § 25-1-440(A).
39 H.B. 4416, 114th Gen. Assemb., Reg. Sess. (S.C. 2002).
40 S.C. CODE ANN. § 25-1-440(E).
41 Sandlands C&D, LLC v. County of Horry, 716 S.E.2d 280, 287 (S.C. 2011) (quoting S.C. State Ports Auth. v. Jasper County, 629 S.E.2d 624, 628 (S.C. 2006)).

powers under Title 25 of the South Carolina code to ensure that the State takes the lead in emergency response.[42] Thus, application of implied preemption suggests that, during a state-wide emergency, the Legislature intended to reserve implementation of the special emergency response powers in Section 25-1-440 to a centralized emergency response marshalled by the Governor.

This interpretation is consistent with the long-used canon of *in pari materia* which notes that statutes should be read alongside those pertaining to the same subject. Thus, the "exclusive" nature of the Governor's authority in wielding the special emergency powers laid down in Section 25-1-440, [43] should be determined only after consulting the related emergency powers statutes in the Code. This interpretation is vindicated by Section 25-1-420 which notes that the reason for codification of emergency powers is to guarantee state response capabilities, ensure a statewide emergency plan, and "…assure the capability of state, county, and municipal governments to execute the State Emergency Plan."[44] Thus, the Legislature made clear their intent that local governments act in accordance with the State's emergency policies.[45]

Title 25 of the Code also notes that, generally, it is the duty of the State to formulate strategies to "minimize loss of life and injury to the populace . . . during emergencies."[46] This is demonstrated by the Legislature's grant of authority to the Executive to go beyond the Code's enumerated powers and usurp local emergency powers entirely when "effective response and recovery action is beyond local government's capability or when . . . state direction is required for implementation of a national plan."[47] Even the determination of when an emergency has surpassed local capabilities is left to the discretion of the Executive.[48]

South Carolina Code Section 44-4, the *Emergency Health Powers Act* further shows the Legislature's intent to provide the Governor overarching power during a statewide emergency.[49] This act,

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42 S.C. CODE ANN. §25.
43 S.C. Att'y Gen., Opinion Letter (Mar. 29, 2020), *supra* note 5 at 2.
44 S.C. CODE ANN. § 25-1-420(A)-(B).
45 S.C. CODE ANN. § 25-1-420(A)-(B).
46 S.C. CODE ANN. § 25-1-450(1)(A).
47 S.C. CODE ANN. § 25-1-450(1)(C).
48 S.C. CODE ANN. § 25-1-440(A)(1)-(5).
49 S.C. CODE ANN. § 44-4-100.

giving the Governor added powers during a health emergency, was formulated so that state authorities would be able "to provide for a coordinated, appropriate response in the event of a public health emergency."[50] Yet, this goal would be impossible if localities were allowed to implement their own plans instead of following a statewide health emergency plan directed by the Governor.

Analysis of the statutory scheme of emergency powers demonstrates the South Carolina Legislature's intent to give the Governor ultimate and "additional [emergency] authority" to direct the State's response to state-wide emergencies.[51] This would make the Governor's emergency health declarations under Section 25-1-440 supreme over conflicting local orders. Hence, both the text and legislative intent of Section 25-1-440 suggest that special emergency powers should be exercised on the State level only.

C. The Effect of Home Rule on the Interpretation of S.C. Code § 25-1-440

However, the effect of local home rule on the proper interpretation of Section 25-1-440 in South Carolina must be considered. The home rule authority of local governments is granted by South Carolina Code Section 4-9-25 which grants to county's within the State the ability to pass any laws necessary to protect the "health, peace, order, and good government in" their counties as long as these laws are consistent with the State's constitution and laws.[52] This allows local governments greater independence in day to day government.

Some argue that home rule in South Carolina precludes an interpretation of Section 25-1-440 granting the Governor overarching authority.[53] However, a basic principal of statutory interpretation, *ut res magis valeat quam pereat* (a statute is construed so that it is effective and not void), requires a different interpretation.[54] It must be assumed that the Legislature wrote both statutes so that they would have effect and accomplish the purposes for which they were crafted. Yet, if local governments were allowed to create

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50 S.C. CODE ANN. § 44-4-120.
51 S.C. CODE ANN. § 44-4.
52 S.C. CODE ANN. § 4-9-25.
53 Hadley, *supra* note 18 at 1.
54 *See generally* ANTONIN SCALIA & BRYAN GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, 45 (5TH prtg. 2008) (Justice Antonin Scalia noted that this canon was one of the key canons of statutory construction in American law.)

their own policies during emergencies that conflict with the State's response, then the legislative purposes of providing for a coordinated and uniform response to statewide emergencies would be frustrated. Thus, when Section 25-1-440 grants the Governor certain emergency powers, those powers are granted to him exclusively to the detriment of other levels of government.

This interpretation also allows the statute to be interpreted so that it is constitutional.[55] As the Attorney General's office suggests, allowing local governments to exercise the powers enumerated in Section 25-1-440 in response to COVID-19 would generate conflict between state and local law creating a violation of article VIII, section 14 of the South Carolina Constitution,[56] which grants the State the ultimate right to set criminal law and requires local compliance.[57] In this case, since most local emergency ordinances made illegal acts which the Governor had declined to prohibit in his orders, a constitutional violation is possible.[58]

Furthermore, even if such local emergency ordinances were not forbidden by the South Carolina Constitution, they would be forbidden by implied conflict preemption which arises "when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible."[59] This occurs when the state and local law mutually "contain either express or implied conditions which are inconsistent or irreconcilable with each other."[60] When applied to the question of special emergency powers, local stay at home and emergency orders that contradict the Governor by forbidding that which the Governor's emergency orders had not, are void under the doctrine of implied conflict preemption. The result would be the preemption of local emergency orders interfering with the Governor's statutory authority.

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55 *Id.* at 46. (This again demonstrates the principle of "*ut magis valeat quam pereat*").
56 S.C. Att'y Gen., Opinion Letter (Mar. 29, 2020), *supra* note 5 at 3.
57 S.C. CONST. ANN. ART. VIII, § 14.
58 *See* S.C. Att'y Gen., Opinion Letter (Mar. 29, 2020), *supra* note 5 at 3.
59 *Sandlands*, 716 S.E.2d at 288 (S.C. 2011) (quoting S.C. State Ports Auth. v. Jasper County, 629 S.E.2d 624 at 630 (S.C. 2006)).
60 *Id.* (quoting Town of Hilton Head v. Fine Liquors, Ltd., 397 S.E.2d 663, 664 (S.C. 1990)).

Given this rule, the interpretation that best harmonizes both statutes is that, while Section 4-9-25 grants local governments general legislative authority and police powers,[61] the intent of the Legislature in enacting Section 25-1-440 was to give the Governor special powers only he could utilize in a statewide emergency to ensure a systematic, coordinated response.[62] While home rule may allow localities greater independence in matters of normal government, the South Carolina Attorney General's 1980 opinion that "[t]here is no enumerated power expressly conferred upon such political subdivisions as would reasonably include the extraordinary authority" seems the best interpretation of the statute. [63]

IV. CONCLUSION

In conclusion, with the State of South Carolina currently grappling with COVID-19, the question of who has authority to wield special emergency powers has caused contention within the state. While local leaders contend that they have the authority to pass all laws necessary to protect the health of their citizens during an emergency,[64] this seems to conflict with the Legislature's goal of providing a uniform, statewide response to emergencies.[65] Thus, the most reasonable interpretation of South Carolina Code Section 25-1-440 is that the legislature intended to vest the Governor with ultimate authority over the exercise of special emergency powers during a state of emergency.

61 S.C. CODE ANN. § 4-9-25.
62 *See, e.g.*, S.C. Att'y Gen., Opinion Letter (Mar. 29, 2020), *supra* note 5 at 1-4.
63 *Id.* at 1-2. (Quoting S.C. Att'y Gen. Office, Opinion on Local Evacuation Orders (1980)).
64 *See* Benjamin, *supra* note 19 at 1.
65 S.C. CODE ANN. §25-1-440.

NOTE

LIBERATING LIBERTY: HOW THE GLUCKSBURG TEST CAN SOLVE THE COURT'S CONFUSING JURISPRUDENCE ON PARENTAL RIGHTS

Hugh C. Phillips [†]

This comment examines the Supreme Court's parental rights jurisprudence under a substantive due process theory. It argues that while the Supreme Court's current precedent regarding parental rights is confusing, a careful and disciplined application of the Court's history and tradition test for determining substantive due process would clarify and protect the right. This would not only clarify parental rights but provide a path forward for the Court to determine and define other unenumerated, fundamental rights. To make this argument, this comment identifies the Court's substantive due process jurisprudence, the history of parental rights in the law, and provides a solution that would clarify both parental rights and substantive due process.

Section II of the article begins by giving an overview of the Court's current substantive due process jurisprudence, its tests, and the methods it uses to determine and define unenumerated, fundamental rights. The history of due process is recounted, the history and tradition and ordered liberty tests are reviewed, and the Court's current application of these discussed. The case is made that the current framework is not being consistently applied by the Court and is thus causing difficulty in defining and protecting unenumerated rights.

Section III of the article argues that the Court's misapplication of its substantive due process tests has left a confused and unworkable parental rights jurisprudence. To highlight this, the Court's decision in

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Troxel v. Granville is discussed. Also, the effects of sociological positivism and the doctrine of parens patria and their effects on the use of substantive due process to protect parental rights are overviewed. Overall, the problem with using opinion and social conscience to formulate and definition of a right is revealed.

Section IV lays out the author's proposed solution. A disciplined and careful application of the Court's history and tradition test and laid out in Washington v. Glucksberg would not only help to identify and define unenumerated rights like parental rights, but also provide a test to clarify the scope of such a right. Application of this test to parental rights would clarify its fundamental nature and ensure the use of strict scrutiny when considering a government infringement on the right.

Thus, instead of arguing for radical change to the law, this article attempts to apply the current framework to protect parental rights and clarify how the Court should handle, fundamental, unenumerated rights. Careful application of Glucksberg's history and tradition test would provide a comprehensive answer. While the long-term effects of substantive due process must be considered, this thesis provides an immediate solution.

I. Introduction

Conservative legal scholars have long argued that parental rights are one of the most important fundamental, unenumerated rights protected by our constitutional system. The American legal system was designed to protect the rights and liberties of every American. In their effort to accomplish this, the American founders enshrined key liberties within the Bill of Rights. However, the rights enshrined within the Constitution have never been thought to be exclusive, and an open question in American law has been how to identify and protect fundamental rights that are unenumerated in the Constitution.[1]

For the past century, the Supreme Court has used substantive due process to protect fundamental liberties, such as parental rights, that are not specifically enumerated within the Constitution. The Court

[1] O. John Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787 (1959).

forbids any governmental interference with such rights, "unless the infringement is narrowly tailored to serve a compelling state interest."[2] The use of the doctrine to protect such rights has long been a question of debate in legal scholarship. How the Court uses the doctrine and by what test it finds and governs unenumerated rights has tremendous ramifications for what is defined as a right and how that right is protected. The Court has undertaken numerous tests which it has used to attempt to identify and define rights. However, it has never consistently and regularly applied a single and coherent test when considering unenumerated rights.

This comment will posit application of the *Glucksburg* history and tradition test to parental rights. Thus, parental rights, a liberty long advanced by conservative legal scholars as fundamental and deserving of constitutional protection, will be used as a frame for re-examining the Court's substantive due process jurisprudence and considering whether it successfully protects the rights of parents. First, the Court's substantive due process framework will be overviewed along with the tests the Court has used to find and define fundamental rights. Second, the problems with the Court's current application of the tests will be discussed along with the confusion this has caused surrounding parental rights jurisprudence and other unenumerated rights. It will be shown that the Court's current application of substantive due process to unenumerated rights fails to properly identify and define those rights that are fundamental and does not provide a consistent framework for determining how or why an individual right is fundamental to begin with.

This comment will apply the Court's *Glucksberg* history and tradition test, in a disciplined and careful fashion, as a solution to the current confusion in the Court's parental rights jurisprudence. Under this standard, a right would first be carefully defined and then that definition alone would undergo a

[2] *Reno v. Flores*, 507 U.S. 292, 302 (1993).

historical analysis to determine whether it truly is a right.[3] Careful definition of parental rights and historical analysis of it under *Glucksberg's* standard reveals that the right should be protected as fundamental and governed under a strict scrutiny standard. The Court should reconsider its parental rights jurisprudence under Glucksberg's standard to make application of the right more consistent with its own dicta and with a coherent application of substantive due process. Application of this test would also provide a stricter and more workable theory of substantive due process especially when applied to unenumerated rights.

II. Background

Parental rights have long been protected by the Supreme Court using the doctrine of substantive due process.[4] This doctrine has sparked controversy, as it has been used by the Supreme Court to enlarge and protect what the Court sees as the fundamental liberties of Americans.[5] The Court derives its substantive due process analysis from the Due Process Clause of the Fourteenth Amendment.[6] This Amendment was passed directly after the Civil War to ensure that all Americans, but especially black American who had been recently freed from slavery, received justice under the law.[7]

The Fourteenth Amendment places a requirement directly on the states that there be "due process of law" before any citizen is subject to the forcible removal of their "life, liberty, or property" at the hands of the government.[8] Although on its face largely procedural, the Court has expanded this clause to protect the unenumerated liberties of citizens from arbitrary government interference.[9] While this has had

[3] *Wash. v. Glucksberg*, 521 U.S. 702, 720-21 (1997).
[4] *Troxel v. Granville*, 530 U.S. 37, 64-69 (2000).
[5] Timothy M. Tymkovich, Joshua Dos Santos & Joshua J. Craddock, *A Workable Substantive Due Process*, 95 Notre Dame L. Rev. 1961, 1962 (2020).
[6] Massey & Denning, American Constitutional Law: Powers and Liberties 461-62 (6th ed. 2019).
[7] Laurent Frantz, *Enforcement of the Fourteenth Amendment*, 9 L. Guild Rev. 122-123 (1949).
[8] U.S. Const., amend. XIV, § 1.
[9] Massey & Denning, supra note 6 at 461; *Lochner v. N.Y.*, 198 U.S. 45, 53 (1905).

benefits in American law, enlarging the meaning of the clause through substantive due process has had drawbacks as the Court has risked overly exalting "autonomy" and "individualism" in the law through its focus on modern individual rights such as abortion and gay marriage while leaving more "traditional" liberties such as parental rights unprotected.[10] The selective nature of the Court's jurisprudence has also enlivened a debate over the proper role of the judiciary in defining the nature and boundary of fundamental human rights.[11] In this background section, the Court's dilemma over parental rights will be prefaced by a history of substantive due process and the different tests the Court uses to define and protect fundamental liberties.

1. History of Substantive Due Process

Substantive Due Process is derived from the Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause. Yet, substantive due process was a relative latecomer to due process jurisprudence. Although the Fourteenth Amendment was ratified in 1868 directly after the Civil War, the Court did not immediately derive substantive rights out of the Due Process Clause. In fact, in the famous *Slaughterhouse Cases* the Court was directly faced with a due process question arising out of the Fourteenth Amendment and refused to extend the Clause past its procedural foundation.[12]

When the Court first decided to make use of the doctrine in *Lochner v. New York*, it was in support of economic liberty.[13] In *Lochner*, the Court argued that while the state had the authority to exercise general police powers when it passed laws, it could not arbitrarily pass laws that had no valid governmental interest, as this would violate the economic liberty interest inherent in the Fourteenth

[10] For a fuller discussion on this topic see: Rena Lindevaldsen, *When the Pursuit of Liberty Collides with the Rule of Law*, 11 LIBERTY U. L. REV. 667 (Summer 2017).
[11] ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 65, 96-119 (Harper Perennial, Rev. Paperback ed. 2003).
[12] *Slaughter-House Cases*, 83 U.S. 36, 80-81 (1872); MASSEY & DENNING, *supra* note 6 at 469-471.
[13] *Lochner*, 198 U.S. at 45.

Amendment.[14] Over the next several decades, the Court used this theory of substantive due process to limit legislative authority and declare hundreds of government regulations invalid infringements on economic liberty.[15] Yet, this age of substantive due process came to a sharp halt when the Court decided *Ferguson v. Skrupa* and repudiated entirely the doctrine of substantive due process.[16] As the Court noted:

> The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. [17]

Despite this stark repudiation, it did not take long for the Supreme Court to revive substantive due process by shifting its focus in examining the doctrine from a focus on property rights to focusing on the liberty interest protected in the clause.[18] Fascinatingly, the Court began this new era of substantive due process by using it to protect parental rights. In *Meyer v. Nebraska*, the Court resoundingly protected parental rights by using the Due Process Clause to protect the liberty interest of parents in having their children taught another language at school without government interference.[19] Speaking of the liberty interest protected by the Clause, the Court argued:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[20]

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[14] *Id.* at 53-54.
[15] William R. Musgrove, *Substantive Due Process: A History of Liberty in the Due Process Clause*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 125 (2008); *Coppage v. Kan.*, 236 U.S. 1, 17 (1915).
[16] Ferguson *v. Skrupa*, 372 U.S. 726, 729 (1963).
[17] *Id.* at 731-32.
[18] MASSEY & DENNING, *supra* note 6 at 486-87.
[19] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
[20] *Id.* at 399.

The Court eventually expanded its substantive due process framework from parental rights to other societal liberties. In *Griswold v. Connecticut* the Court struck down a state statute banning the use of contraceptives by married couples on the basis that it interfered with their privacy interests as protected by the Due Process Clause.[21] While declining to "sit as a super-legislature to determine the wisdom, need, and propriety of laws," the Court used an expansive view of liberty found in freedom of association to argue that the statute was unconstitutional.[22]

The Court's new substantive due process "liberty" jurisprudence was solidified when it used the Equal Protection Clause and Due Process Clause to protect the liberty right of a bi-racial couple to marry and also declared a fundamental right to abortion in *Roe v. Wade*.[23] Since then, the Court has in spurts used this theory of substantive due process to make substantial changes in the country's social policy, such as declaring sodomy laws unconstitutional, legalizing same sex marriage, and redefining the meaning of sex.[24] Some of these changes were needed and just while others have deeply divided the nation. The history of the Court's substantive due process jurisprudence leaves critical questions unanswered about how the Court should define liberty under the Fourteenth Amendment, the role of the judiciary in defining fundamental rights, and what rights truly should be protected.

2. Tests of the Court's Substantive Due Process Jurisprudence

The Supreme Court has used several tests throughout its substantive due process jurisprudence to identify and protect rights it deemed fundamental. The test the Court uses to determine fundamental liberties such as parental rights is critical because this determines the substance and extent of the right. In any examination of an unenumerated right under substantive due process, one must first determine

[21] *Griswold v. Conn.*, 381 U.S. 479, 481-485 (1965).
[22] *Id.*
[23] *Loving v. Va.*, 388 U.S. 1, 12 (1967); *Roe v. Wade*, 410 U.S. 113, 148-157, 166 (1973).
[24] *Lawrence v. Texas*, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

whether a liberty interest is at stake and then, whether it is fundamental.[25] This section will overview the different substantive due process tests the Court has used to identify and protect fundamental liberties such as parental rights.

When analyzing fundamental rights under substantive due process, the key term to consider is liberty. It is this "liberty" interest in the Fourteenth Amendment that is used to define the limits of fundamental unenumerated rights. Shockingly, the Court has never defined the limits of the term.[26] Early American jurists defined the term as "freedom from restraint."[27] Specifically, the founding generation seemed to argue that the Constitution protects civil liberty which Webster defined as "the liberty of men in a state of society, or natural liberty so far only abridged and restrained as is necessary and expedient for the safety and interest of the society, state, or nation."[28] Thus, at its core, liberty seems to be a balancing test between the freedom of the individual vs. his obligations and duties as a member of society. It is this line that the Court has struggled to draw in its tests for fundamental rights and it has never held consistently to one approach.

While the Court has used many tests in its attempts to define and protect fundamental rights, historically two tests have predominated: the ordered liberty test and a history and tradition test.[29] the ordered liberty test was developed first and the history and tradition test now holds the most weight with the Court. However, both tests have had a tremendous impact on parental rights.

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[25] Jeffrey C. Tuomala, CASEBOOK COMPANION TO CONSTITUTIONAL LAW, Pt. 7, Ch. 4: Substantive Due Process, 3-4 (2020).
[26] Meyer, *supra* note 19 at 399.
[27] NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE VOL. II 7 (American Foundation for Christian Education Press, 18th printing, 2006) (1828).
[28] *Id.* (Webster further notes that "Civil liberty is an exemption from the arbitrary will of others, which exemption is secured by established laws, which restrain every man from injuring or controlling others. Hence the restrains of law are essential to civil liberty.").
[29] The author has confined his analysis to these two tests because these tests are the only ones that grapple with defining an unenumerated right. Other tests, such as the "shocks the conscience test" are much more fact centered and practical and do not delve into the issue.

A. The Ordered Liberty Test

The first test the Court formulated was the ordered liberty test. This test seems to have its beginning in the natural law heritage of American jurisprudence as the Court had used the concept to strike down government action long before the Fourteenth Amendment was written.[30] A perfect example of this was the Supreme Court's decision in *Fletcher v. Peck* were it upheld the transfer of stolen Indian lands from being repealed because the land was currently possessed by innocent parties.[31] In making this decision the Court argued that "there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded" and that "[i]t may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power."[32]

This framework was retained and expounded by the Court when it began to formulate the ordered liberty test in the *Lochner* era. It applied this framework to substantive due process in *Herbert v. Louisiana* when it argued that "state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land'".[33] This reasoning was affirmed in *Palko v. Connecticut* when the Court argued that using *Herbert's* test to determine whether a state action violated a principle that is "implicit in the concept of ordered liberty" was the crux of a substantive due process claim.[34]

While this view of substantive due process was quashed by the Court in *Benton v. Maryland*, the test made a comeback in the Court's landmark case of *Bowers v. Hardwick*.[35] In *Bowers* the Court rejected

[30] *Fletcher v. Peck*, 10 U.S. 87, 130, 133 (1810); MASSEY & DENNING, *supra* note 6 at 461.
[31] *Fletcher*, 10 U.S. at 139-40.
[32] *Fletcher*, 10 U.S. at 133, 35; MASSEY & DENNING, *supra* note 3 at 461.
[33] *Herbert v. La.*, 272 U.S. 312, 316-17 (1926).
[34] *Palko v. Conn.*, 302 U.S. 319, 324-25 (1937); Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 222-23 (2007).
[35] *Benton v. Md.*, 395 U.S. 784, 794-95 (1969); *Bowers v. Hardwick*, 478 U.S. 186 190-196 (1986).

a claim that criminalizing sodomy was a violation of fundamental rights.[36] In doing so, however, it directly returned to *Palko's* "ordered liberty" standard in an effort to prevent the Court from simply creating rights out of whole cloth.[37] In defending its decision, the Court argued that it:

> is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution . . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.[38]

While *Bowers* was later overturned by the Court's decision in *Lawrence v. Texas*, the ordered liberty test has retained a place in the Court's jurisprudence as a factor in the Court's history and tradition test as elucidated in *Washington v. Glucksberg* and as defended in Justice Scalia's dissent in *Lawrence.*[39]

B. The History and Tradition Test

The second and more recent test the Court has used to determine and define fundamental rights under substantive due process has been the history and tradition test. This test was first posited by the Court in 1934 in *Snyder v. Massachusetts*.[40] In *Snyder*, the Court upheld a state murder conviction against procedural and substantive due process claims.[41] However, the Court set a new test for defining fundamental liberties under the substantive due process doctrine when it held that state action would not be overturned "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[42]

The Court further applied and developed this test in *Moore v. City of East Cleveland*.[43] In *Moore*,

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[36] *Bowers*, 478 U.S. at 191.
[37] *Id.* at 194-95.
[38] *Id.* at 195.
[39] *Lawrence v. Texas*, 539 U.S. at 593 & no. 3 (2003); *Glucksberg*, 521 U.S. at 721 (1997).
[40] Farrell, *supra* note 31 at 225-26.
[41] *Id.* at 225-226; *Snyder v. Mass.*, 291 U.S. 97, 122 (1934).
[42] *Snyder*, 291 U.S. at 105; Farrell, *supra* note 31 at 225-226.
[43] Farrell, *supra* note 34 at 226.

the Court argued that "[a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society."[44] Thus, only those rights that are "deeply rooted in this Nation's history and tradition" will be afforded fundamental status and protection under the Due Process Clause.[45] Critical to the background and thrust of this comment however, is the fact that the Court first developed this test in *East Cleveland* around a claim of parental rights and familial privacy.[46]

The Court further developed its history and tradition test for determining fundamental rights when it used history and tradition as a key factor in deciding *Bowers v. Hardwick* and argue that there was no historically accepted right to homosexual sodomy.[47] However, the test was further developed in the Courts decision in *Michael H. v. Gerald D*.[48] In this case, the Court denied a paternal rights claim on the basis that the claim of the father was not consistent with the history and tradition of the United States.[49] Justice Scalia writing for the majority noted:

> In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[50]

Justice Scalia further articulated this view of the history and tradition test in *Reno v. Flores* where he demonstrated that if substantive due process is to be properly used in protecting fundamental rights, the right must be strictly defined and then subjected to a historical analysis limited to that strict

[44] *Moore v. East Cleveland*, 431 U.S. 494, 503-506 (1977).
[45] *Id.* at 503.
[46] *Id.* at 503-05.
[47] Farrell, *supra* note 34 at 227.
[48] *Id.* at 227-28.
[49] *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989).
[50] *Id.* at 122-23.

definition.[51] Thus, novel rights or those not having a long history of acceptance within American society would not meet this test.[52]

The greatest articulation of the history and tradition test, however was in the Court's decision in *Washington v. Glucksberg* which declined to recognize a fundamental right to assisted suicide.[53] In *Glucksberg*, Justice Rehnquist writing for the Court reaffirmed the history and tradition test and restated Justice Scalia's two pronged analysis: (1) carefully define the right, and (2) subject that definition to a strict history and tradition analysis.[54] In defense of this test, Justice Rehbquist argued that:

> [T]he development of this Court's substantive-due-process jurisprudence, described briefly above, has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment--never fully clarified, to be sure, and perhaps not capable of being fully clarified--have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review. In addition, by establishing a threshold requirement--that a challenged state action implicate a fundamental right--before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.[55]

Since its formulation in *Glucksberg*, the test has been sporadically used by the Court to determine and protect fundamental rights.[56] The test was applied in *Lawrence v. Texas* although the majority was roundly criticized by Justice Scalia for what he considered their lack of strict application of the test.[57] The test was further mentioned, but not really applied in the majority opinion in *Obergefell v. Hodges* but was championed by Chief Justice Roberts in his dissent.[58]

Yet, these two main tests, the history and tradition test and the ordered liberty test, have been at

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[51] *Flores*, 507 U.S. at 302-03; Farrell, *supra* note 34 at 229-230.
[52] *Flores*, 507 U.S. at 303.
[53] *Glucksberg*, 521 U.S. at 706; Farrell, *supra* note 34 at 230.
[54] *Glucksberg*, 521 U.S. at 720-22; Farrell, *supra* note 34 at 230.
[55] *Glucksberg*, 521 U.S. at 722.
[56] *D.A.'s Office v. Osborne*, 557 U.S. 52, 72 (2009).
[57] *Lawrence*, 539 U.S. at 572, 592-98.
[58] *Obergefell*, 576 U.S. at 671-72, 698-99, 704-13.

the forefront of the Court's struggle to define fundamental liberties through the substantive due process clause. While these tests have not been universally applied by the Court, the ordered liberty test has been more or less subsumed into the history and tradition test in substantive due process questions. When it comes to parental rights, they provide a framework from which to determine whether current law adequately protects parental rights or whether a new test or more drastic solution is needed.

III. THE PROBLEM WITH MODERN PARENTAL RIGHTS AND SUBSTANTIVE DUE PROCESS

Despite the presence of these tests, the numerous Supreme Court cases on parental rights in the early twentieth century, and the array of Supreme Court dicta on the nature and importance of parental rights, the current state of protections for parental rights in the law is unclear and the Circuits have struggled to apply the Court's precedents on this issue.[59] In fact, the Fourth Circuit has noted in *Hodge v. Jones* that "[t]here is little, if any, clear guidance in the relevant caselaw that would permit us to chart with certainty the amorphous boundaries between the Scylla of familial privacy and the Charybdis of legitimate governmental interests."[60] The First and Fifth circuits have likewise struggled to actually determine where to set the boundary between parental rights and proper state interests in making determinations of law.[61] While acknowledging the importance of parental rights, these Circuits have all complained that the Supreme Court has given no "clear" guidance on how important this right is and what test should be used when examining parental rights under substantive due process.[62]

A. Troxel v. Granville and the Court's confusion regarding parental rights.

[59] *Hodge v. Jones*, 31 F.3d 157, 164 (4th Cir. 1994).
[60] *Id.*; *see also Frazier v. Bailey*, 956 F.2d 920, 931 (1st Cir. 1992) ("The dimensions of [the] right [to familial privacy] have yet to be clearly established"); Michael Farris, *The Confused Character of Parental Rights in the Aftermath of Troxel*, PARENTAL RIGHTS FOUNDATION, https://parentalrights.org/get_involved/print-resources/. (Last visited Oct. 9th, 2020).
[61] *Frazier v. Bailey*, 956 F.2d 920, 931 (1st Cir. 1992) ("The dimensions of [the] right [to familial privacy] have yet to be clearly established"); *Doe v. Louisiana*, 2 F.3d 1412, 1416 (5th Cir. 1993) (while there is a constitutional right to "family integrity," it is not clearly established).
[62] *Id.*

This confusion is somewhat surprising given the Court's past dicta about the import of parental rights. The Court's most recent excursion into parental rights showed the underlying confusion as to the nature and scope of parental rights. In *Troxel v. Granville*, the Court considered parental rights in the context of a child visitation dispute between two unmarried individuals.[63] Specifically, the Court considered whether the awarding of visitation rights to the Troxel's was a denial of Granville's parental rights under substantive due process.[64] The Court held that the specific application of Washington's visitation statute to Granville did deny her of her parental rights under substantive due process because the state had not taken into account "Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters."[65] In making this decision the Court argued that the "[t]he liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court."[66] With these words, the Court reminded the legal community that parental rights have long constituted one of the most important liberty interests that American law protects.[67]

Yet, while the majority in *Troxel* upheld the historical definition of parental rights and affirmed its importance, even terming it a "fundamental" right under substantive due process, the Court was deeply divided over whether to treat the right as fundamental, what the scope of the right would be, and the proper standard of review for such cases.[68] The Court's plurality, while recognizing parental rights as a fundamental liberty arising out of the Fourteenth Amendment, only chose to consider questions related to this liberty using a lower rational-basis standard of review.[69] Thus, while in dicta deeming parental rights a

[63] *Troxel v. Granville*, 530 U.S. 37, 60-63 (2000).
[64] *Id.* at 63-65.
[65] *Id.* at 72.
[66] *Troxel v. Granville*, 530 U.S. at 65.
[67] *Id.* at 65.
[68] *Id.* at 80.
[69] *Id.* at 65-75.

fundamental right, the plurality refused to treat it as such and instead chose to allow the government to regulate in this area as long as they could show a rational government interest for such regulation.[70]

Justice Souter in his concurrence acknowledged the confusion the Court's precedent had caused in this area but urged the Court not to venture into a discussion of substantive due process to determine the scope of the parental right and instead simply decide the case at hand.[71] He urged that the Court maintain the status quo and not create any "fresh furrows in the 'treacherous field' of substantive due process."[72] Thus, while agreeing that parental rights were important, Justice Souter argued for a case by case facial test to determine whether the historical parental right was violated.[73]

By contrast, Justice Thomas, in his concurrence, argued for a change in parental rights jurisprudence.[74] First, he hinted that the Court should reexamine its substantive due process doctrine and whether it was proper for the judiciary to protect unenumerated rights as "fundamental" under the due process clause.[75] However, since this issue was not before the Court, Justice Thomas argued that since the Court's precedent held parental rights to be a fundamental right, it should be treated as such by the courts and judged using strict scrutiny.[76] This would force the government to prove a compelling state interest before they could infringe on the rights of parents to direct their child's upbringing.[77]

Diverging from the majority, Justices Stevens, Scalia, and Kennedy dissented.[78] Justice Stevens argued that parental rights were actually much more limited than the majority suggested and that the

[70] *Id.* at 66-73.
[71] *Id.* at 76-79.
[72] *Troxel v. Granville*, 530 U.S. at 76.
[73] *Id.* at 78-79.
[74] *Troxel,* 530 U.S. at 80 (Thomas, J. concurring).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at 80-102.

interests of the child should be focused on more.[79] By contrast, Justice Scalia, while arguing that parental rights were a God given fundamental right, rejected substantive due process out of hand and argued that unenumerated rights should not be protected by a theory of substantive due process.[80] Instead, he urged that this was the role of the legislature and that the federal courts have no role to play in such a dispute.[81]

Thus, *Troxel v. Granville* showed that while a majority of the Court holds parental rights to be an important unenumerated right and a majority are even willing to call it fundamental, there is disagreement as to whether the right should actually be treated as fundamental and how this would affect state law.[82] Yet, this confusion on how the Court defines and protects fundamental unenumerated rights under the due process clause extends to other areas of the law as well. Abortion is a prime example, for while the Court has not qualified it as a fundamental right since *Roe* and abortion is often defined using only an intermediate scrutiny standard by the Court,[83] the Court has rarely upheld a regulation imposed on abortion; suggesting that they see the right as fundamental. By contrast, an amorphous right to privacy has been deemed fundamental by the Court, yet so far it has not set the boundaries of such a right nor dealt with the challenges to privacy posed by modern technological advances.[84] Clearly, it is necessary for the Supreme Court to present a test with which to clarify rights such as parental rights and provide guidance on the scope of the right and how to protect it.

B. The effect of sociological law on parental rights jurisprudence

However, confusion as to the nature and scope of parental rights is not limited to simply ambiguous application by the Supreme Court of their own precedent. Recent developments in modern

[79] *Troxel*, 530 U.S. at 80-91 (Stevens, J. dissenting).
[80] *Troxel,* 530 U.S. at 92-93 (Scalia J. dissenting).
[81] *Id.* at 91-93 (Scalia J. dissenting).
[82] *Troxel,* 530 U.S. at 60-91.
[83] *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2132-33 (2020).
[84] *Griswold*, 381 U.S. at 485.

law as well as the changing nature of the family itself have also contributed to the pressing need for the Court to address the question of how best to identify and protect parental rights. Social change inevitably causes confusion in the rights jurisprudence, especially when a court attempts to consider the nature and scope of an unenumerated right. This is because any substantive due process analysis "must begin with a careful description of the asserted right."[85] The often dramatic effects changes in family structure and society have on the law reveal even more the importance of having a proper standard for identifying and balancing a citizen's rights and responsibilities that is grounded in more than just dependence on the "new insight" and changed understandings" of any one generation as to what constitutes a liberty interest.[86]

The Court's confusion on the correct standard for parental rights and its fundamental nature in the law is grounded in the modern confusion among the legal community about the definition and role of the family in society.[87] The family once was clearly defined as a separate institution in society protected by the law.[88] However, modern trends towards individual autonomy and cosmopolitanism have changed the laws view of family.[89] The family was once clearly defined in the law, established by the law of nature as a voluntary association between a man and a woman, their children, and their extended family.[90] The family unit was the most important association in life and therefore the foundation, not only of civil society, but

[85] *Flores*, 507 U.S. at 302.
[86] *Obergefell*, 576 U.S. at 660, 664.
[87] *Id*, at 663-72; *Moore,* 431 U.S. at 503-506; *see also* Purdue University, *What is Family?*, in WISCONSIN FAMILY IMPACT SEMINARS (2015), https://www.purdue.edu/hhs/hdfs/fii/wp-content/uploads/2015/07/s_wifis01c02.pdf
[88] Joseph Story, entry on "Natural Law" in the *Encyclopædia Americana*, ed. Francis Lieber, Vol. IX 152 (Philadelphia: Carey and Lea, 1832); Scott Yenor, THE TRUE ORIGIN OF SOCIETY: THE FOUNDERS ON THE FAMILY (2013) https://www.heritage.org/political-process/report/the-true-origin-society-the-founders-the-family#_ftn49.
[89] The author is extremely interested in more research on how the redefinition of the family and the jurisdictional conflict between the family and the State have transformed American law in the modern day. However, the author will leave this scholarship for another day. Here the family's deep roots in law is meant only to spur a discussion of substantive due process and how the Court should best protect unenumerated rights in the law.
[90] Story, *supra* note 37, at 152.

of government itself.[91] This view of the family created a high regard for parental rights in the common law.[92] However, the shift in American law towards redefinition of the family and the Court's shifting interpretation of substantive due process rights in the twentieth century created a fundamental shift in the legal definition of the family.

At the beginning of the twentieth century, the law still retained the traditional view of the family as the legal definition for the purposes of the common law.[93] It was on the basis of this relationship – the sanctity of the family and its privacy interest – that the Supreme Court took the first drastic step in right to privacy jurisprudence and invalidated Connecticut's anti-contraception law.[94] However, not long after this, the Court shifted from viewing such laws in the framework of marriage to arguing that the primary question of substantive due process in the law was always one of individual rights.[95] This began a shift of focus in American law from analyzing individuals in relation to their associations and commitments to analyzing them only on the basis of their autonomous, sole self.[96]

While the Court briefly returned to a traditional view of the family in *Bowers v. Hardwick* by refusing to extend due process rights beyond traditional norms,[97] it quickly developed a confused jurisprudence that placed "the autonomy of the person" over all others in due process considerations.[98] This view of autonomy in due process jurisprudence regarding the family was brought to a head in the Supreme Court's 2016 decision in *Obergefell v. Hodges*.[99] In *Obergefell*, the Court used the substantive due

[91] *Id*, at 152-54.
[92] *Prince*, 321 U.S. at 168-69.
[93] *Meyer*, 262 U.S. at 404-405.
[94] *Griswold*, 381 at 482-86; *Yenor*, supra note 88.
[95] *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).
[96] *Id*, at 453;
[97] *Bowers*, 478 U.S. at 190-196.
[98] *Lawrence*, 539 U.S. at 571-75.
[99] *Obergefell*, 576 U.S. at 644.

process clause of the Fourteenth Amendment to declare that homosexual marriage was legal.[100] Yet, to do so the court completely redefined the family and broke with centuries of legal tradition to declare homosexual marriage a fundamental right under the Constitution's framework of liberty.[101] This is largely because the Court has shifted so dramatically in its application of the Due Process Clause to fundamental rights issues and the effect on the legal theory of parental rights may be severe.[102]

Why is this shifting social and legal view on the nature of the family important to consideration of the proper test for judging parental rights under substantive due process? Because it shows that formulation of a fundamental right, especially an unenumerated one must be based on more than just shifting social morays. To do otherwise would be to threaten fundamental rights and undermine the doctrine of substantive due process by transforming the Court's decisions simply "into the policy preferences of the members of [the] Court."[103] To prevent this, a more absolute and unchanging standard must be applied. Under the Court's current substantive due process precedent, a disciplined and careful application by the Court of its *Glucksberg* history and tradition test under substantive due process would be enough to clarify the nature and scope of parental rights as well as other unenumerated rights.[104]

C. The growing jurisdictional conflict between parents and the State: the modern presumption of the State as *parens patriae*.

Another development in the law that has caused confusion on the proper application of unenumerated parental liberties in American law is the modern presumption that the state has almost absolute authority over the family and children under the doctrine of *parens patriae*. The doctrine of

[100] *Id*. at 663-676.
[101] *Id*. at 658-681.
[102] *Bowers*, 478 U.S. at 194-95; *Obergefell*, 576 U.S. at 671-678.
[103] *Glucksberg,* 521 U.S. at 720.
[104] The question of the proper test for determining rights should lead the Court to realize that all fundamental rights cannot simply be based in history and tradition. Law must be based on a deeper absolute of right and wrong and should lead back to a natural law jurisprudence as the only proper and unchanging foundation of liberty.

parens patriae, which is translated as "parent of the country" was defined by the Supreme Court in *Alfred L. Snapp & Son v. P.R.* as the duty of the government to step in to protect and care for people who cannot care for themselves.[105] Traditionally, American law has limited this doctrine to just such a situation: when an individual is incapable of caring for themselves or when a group is in need of protection.[106]

The question of how this doctrine applies to parental rights is unclear. However, historically the Court has argued that the *parens patriae* interest is best served when the family is maintained.[107] Despite the limited nature of this doctrine in American law, it seems that some in the modern day would extend it to the extent that even liberties protected by the due process clause, such as parental rights, would suffer.[108] In fact, some go so far as to argue that government control over traditional parental functions should per se preempt parental wishes on key areas such as education.[109] This argument is grounded in the belief in the substantive due process rights of the child and the importance of putting the State's view of how a child should be raised above the individual family's view.[110] Yet, because of the implied nature of the child's right within the American system of government and modern controversy surrounding the limits and extent of such a right, the correct line to draw in protecting such a right has remained unclear. This makes parental rights the perfect test case in which to reexamine the Court's substantive due process framework and how it affects parental and other unenumerated rights.

The current problem in parental rights jurisprudence have been highlighted by the Court's

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[105] *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 600 (1982).
[106] Obergefell, *supra* note 24, at 600; *Late Corp. of Church of Jesus Christ v. United States*, 136 U.S. 1, 58 (1890).
[107] *Santosky v. Kramer*, 455 U.S. 745, 766-67 (1982).
[108] Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1 (2020).
[109] *Id.* at 51. ("The new legal regime should impose a presumptive ban on homeschooling, allowing an exception for parents who can satisfy a burden of justification. And it should impose significant restrictions on any homeschooling allowed under this exception").
[110] *Id.* at 57, 65-66. ("There are bases in current law for thinking that the Supreme Court should conclude that the Federal Constitution provides children with positive rights to education and protection. One lies in the due process clause of the Fourteenth Amendment").

inconsistent application of a test for the right, the Court's creep toward a sociological application of substantive due process, and the effects changing views of liberty have on law. The confusion on the limits and scope of parental rights raises the question of whether the Court's substantive due process doctrine provides an adequate method of discovering and protecting unenumerated rights. Is the doctrine itself inadequate or is it simply a matter of inadequate application of the test to certain areas of the law? Should the Court even attempt such an analysis or leave the question solely to the political sphere to define the rights and liberties of Americans? A coherent solution to these questions may be presented through careful application of the *Glucksberg* test to such situations.

IV. Protecting Parental Rights under Glucksberg's history and tradition test

Now that substantive due process has been explained and the problem in parental rights has been revealed, this section will advance a test for solving the problem in parental rights jurisprudence. Despite the confusion the Court has caused around parental rights and the acknowledged difficulty of the issue, a disciplined and careful application by the Court of its history and tradition test under substantive due process as laid out in *Washington v. Glucksberg* may be enough to solve this issue and not only protect parental rights but provide clarity in this area of the law. While the Court has in dicta, provided historical analysis of parental rights and acknowledged the right's fundamental nature, even the Court's latest opinion admits that it has not conscientiously applied the history and tradition test to the presumed parental right in the attempt to set its scope and boundary.[111] While by no means the only, or possibly even the most effective, way to protect unenumerated liberties[112], careful and disciplined application of the

[111] *Troxel v. Granville*, 530 U.S. 57, 78 (Souter J. Concurring).
[112] This solution leaves unanswered the debate over substantive due process and judicial review. This debate should be engaged in however in order to determine the proper limits on the scope of the judiciary in considering social issues.

history and tradition test in the past by the Court has resulted in clearly defined rights and the protection of liberty.[113] The greatest example of this is the Court's careful analysis and rejection of an asserted right to assisted suicide in *Washington v. Glucksberg*.

This section will apply Glucksberg's careful articulation of the history and tradition test to parental rights and argue that such application will better define and clarify the right. Following Justice Rehnquist's careful articulation of the history and tradition test, parental rights will first be defined and then a historical analysis will be conducted to see if the right is "deeply rooted" in the "history and tradition[s]" of the American people.[114] It will be shown that not only can parental rights be plainly defined, but that definition is plainly protected by judicial and legal history. Because the right is easily defined and deeply grounded in the history and tradition of American law, it should be afforded fundamental status and governed under a strict scrutiny standard of review.[115]

1. Parental Rights Defined

The first step in application of Glucksberg's history and tradition test to parental rights is fairly simple: define the terms.[116] This is an attempt to provide a "careful description" of the right at issue to provide a basis for the historical analysis of the right.[117] While acknowledging that not all issues can be perfectly or specifically defined, the Court argued that the attempt to define the right in question limits the power of judicial review and at the very least allows the right to be "carefully refined by concrete examples."[118]

Parental rights, as a general term, have long been defined by the Supreme Court as the "liberty of

[113] *See Glucksberg,* 521 U.S. at 702; *Bowers*, 578 U.S. at 186.
[114] *Glucksberg,* 521 U.S. at 721 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).
[115] *Glucksberg*, 521 U.S. at 720-21.
[116] *Glucksberg*, 521 U.S. at 721.
[117] *Id.*
[118] *Id*. at 722.

parents and guardians to direct the upbringing and education of children under their control."[119] This definition has historical basis in the western legal tradition. Blackstone defined this right similarly when he noted that parents have an obligation to their children's "maintenance, their protection, and their education."[120] This definition will be used throughout this comment to mean the authority of parents to direct the total upbringing of their children.[121] With this definition settled it is possible to proceed to a historical analysis of the right.

While most in the legal profession agree with this definition and that parents should be accorded a large measure of autonomy in how their children are raised, modern courts have struggled with the best standard to use when balancing the interests of parents, children, and the State.[122] Parental rights have long been seen by American law as a fundamental liberty and their preservation as best serving the interest of the parent, child, and society.[123] However, modern changes in substantive due process and how the legal profession analyzes this right necessitate a return to fundamentals in order to properly examine how the State should interact with families and whether the law should give deference to families. This shows the importance of providing a historical analysis of the right in order to determine the boundaries and scope of the right in American law.

2. A Strict History and Tradition analysis of Parental Rights

The next step in analyzing parental rights under the history and tradition test is to subject that definition to a strict history and tradition analysis.[124] Under this analysis, the specific definition is carefully

[119] *Pierce v. Soc. Of Sisters*, 268 U.S. 510, 534-535 (1925); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right to "[E]stablish a home and bring up children"); *Troxel*, 530 U.S. at 65. ("the interest of parents in the care, custody, and control of their children").
[120] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *434.
[121] *Troxel*, 530 U.S at 65.
[122] *Troxel*, 530 U.S. at 80.
[123] *Troxel v. Granville*, 530 U.S. at 65.
[124] *Glucksberg*, 521 U.S. 720-22.

examined to see whether it "objectively" fits within the traditional and historical rights protected by American law.[125] If it does, the right is seen as fundamental and can only be overturned after passing a strict scrutiny standard of review.[126] The purpose behind this historical analysis is to determine whether the right in question is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[127]

When analyzing parental rights, it will be shown that the intimacy of family life and parental rights have always been regarded with extreme deference in American law.[128] The rights of parents to direct the upbringing of their children is deeply rooted in the western legal tradition and protected in dicta by multiple Supreme Court precedents.[129] Because of this, parental rights should be afforded deference as a fundamental right in American jurisprudence. Parental rights place in the western legal tradition will be examined and then Supreme Court precedent on the right will be overviewed.

a. Parental rights in the western legal tradition

Parental rights have long held an exalted place in the western legal tradition. Early in the days of the American republic, Blackstone, looking to preeminent patriarchs of the western legal tradition such as Puffendorf and Montesquieu, argued that the parental right, indeed "duty" of parents, to direct their child's upbringing was inherent in the law of nature.[130] James Kent noted in his *Commentaries* that "the obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws."[131] Furthermore, Kent set down the legal standard for parental rights in early

[125] *Id.* at 720-21.
[126] *Id.* at 721 (citing to *Reno v. Flores*, 507 U.S. 292, 302 (1993)).
[127] *Synder*, 291 U.S. at 105.
[128] *Griswold,* 381 U.S. at 482-83, 486. (While infamous for its extension of an ill-defined right to privacy, the Court's grappling with the issue of State interaction with different human "associations" has often been overlooked).
[129] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *434-438; *see also* Erica Degroff, *Parental Rights and Public School Curricula: Revisiting Mozert after 20 Years*, 38 J.L. & EDUC. 83, 108-110 (2009).
[130] *Blackstone. at *435.*
[131] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW, * 183.

American law arguing that "[w]hat is necessary for the child is left to the discretion of the parent and . . . there must be a clear omission of duty, as to necessaries, before a third party can interfere."[132] Thus, the early days of the Republic were marked by great deference for parental rights in the highest levels of American law.[133]

Yet, this respect for the rights of parents was grounded in more than just a cultural moray. Instead the respect for parental rights in early American law was grounded in a distinctive jurisprudence that held an even deeper respect for the unique and distinct role of the family as a separate jurisdictional unit from the State with different obligations and duties.[134] As Degroff notes, Blackstone and other early scholars of the western legal tradition saw the family as created by God to be the very first governmental and societal unit in creation.[135] As a result, the family has always been seen by American law as an institution with sovereignty independent of the State.[136] As Chief Justice Parker of the Alabama Supreme Court notes, this sovereignty was best put by Abraham Kuyper when he noted that:

> "Behind these organic spheres, with intellectual, aesthetical and technical sovereignty, the sphere of the family opens itself, with its right of marriage, domestic peace, education and possession; and in this sphere also the natural head is conscious of exercising an inherent authority, -- not because the government allows it, but because God has imposed it. Paternal authority roots itself in the very life-blood and is proclaimed in the fifth Commandment . . . A people therefore which abandons to State Supremacy the right of the family . . . is just as guilty before God, as a nation which lays its hands upon the rights of the magistrates."[137]

This view of family sovereignty was not confined to a uniquely religious view of American law however. John Locke, a key enlightenment philosopher who had been heavily influenced by the biblical

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[132] *Id.* at *186; *see also* Degroff, at 112.
[133] 2 KENT, *supra* note 132, at *186.
[134] Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 193 (Little and Brown, 3d ed.) (1846) (ebook) (Marriage "is the parent and not the child of Society"); Yenor, *supra*, note 88.
[135] Degroff, *supra* note 10, at 110.
[136] *Ex Parte E.R.G.*, 73 So. 3d 634, 650-51. (Ala., 2011) (Parker, C.J. concurring).
[137] ABRAHAM KUYPER, THE STONE LECTURES ON CALVINISM: LECTURE SIX: CALVINISM AND POLITICS, *123 (Hoveker and Wormser, 1899); *Ex Parte E.R.G.*, 73 So. 3d at 651 (Parker, C.J. concurring).

foundation of Anglo-American law, held the same view and argued that the role of state and family were completely different governmental units sovereign in their own jurisdiction.[138] In fact the Supreme Court recognized just this point in *Parham v. J.R.* when it ruled that the western legal tradition has long held the family to be a separate jurisdictional unit from the state and there is a presumption in favor of parental authority and wisdom unless proven abuse has occurred in that case.[139] Thus, American law was founded on a deep respect for and recognition of the family as a separate institution and the unique role of parents in raising their children.

2. Supreme Court Precedent on Parental Rights

However, when analyzing a right under the history and tradition test, not only must the general western legal tradition be consulted, but prior Supreme Court precedent on the issue. This is because prior Supreme Court precedent on the issue are helpful guideposts in revealing whether the right at issue really is grounded in the American "legal tradition" to the extent necessary to classify it as a fundamental right.[140] Thus, if a right is fundamental, it is likely, although not certain that the Supreme Court will have considered the issue before.

When it comes to parental rights, the Supreme Court has long acknowledged parental rights as a fundamental and basic principle of American law whose protections the Court has largely grounded in the Fourteenth Amendment's due process clause.[141] In the landmark parental rights decision of *Pierce v. Society of Sisters* the Supreme Court recognized the rights of parents as "fundamental" and argued that

[138] *Ex Parte E.R.G.*, 73 So. 3d at 651 (Parker, C.J. concurring) (citing to John Locke, Two Treatises of Government § 71).
[139] *Parham v. J.R.*, 442 U.S. 584, 602-603 (1979) ("The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."); Parental Rights Foundation, *Tradition of Parental Rights*, https://parentalrightsfoundation.org/legal/parental_rights_tradition/. (Last accessed on Oct. 10, 2020).
[140] *Glucksberg*, 521 U.S. at 722.
[141] *Troxel*, 530 U.S at 65-66.

parents, not the State, have the primary duty to raise their children to be good adults and citizens.[142] The Court opined that the rights of parents to lead and guide their children's upbringing are critical rights recognized in American law and accepted the arguments of the appellee that parental rights are part of "the very essence of personal liberty and freedom."[143] The Court noted:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[144]

This decision built on the Supreme Court's ruling in *Meyer v. Nebraska* that explicitly rejected a statist view of childrearing and held that "our institutions rest[ed]" on much different grounds.[145] In *Meyer*, the Court rejected a Nebraska state law that forbade children to be taught in any language but English.[146] The Court held that while the State had a proper interest in seeing that the children of the United States are educated and prepared to be good citizens, the State's interest is limited by the fundamental common law rights of parents over their children's education.[147] As Zollman notes, a key feature of the decision--that would shape all other parental rights decisions after it--was the *Meyer* Court's determination to ground parental rights in a substantive due process analysis of the Fourteenth Amendment.[148] Thus, the Court for the first time held the rights of parents in raising their children as they see fit to be one of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[149]

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[142] *Pierce*, 268 U.S. at 535.
[143] *Id.* at 534-35; Brief for appellee.
[144] *Id.* at 534-35.
[145] *Meyer*, 262 U.S. at 401-402.
[146] *Id.* at 401-403.
[147] *Id.* at 400.
[148] Carl Zollmann, *Parental Rights and the Fourteenth Amendment*, 8 MARQ. L. REV. 53, 54 (1923).
[149] *Meyer*, 262 U.S. at 399.

Later, in *Prince v. Commonwealth of Massachusetts*, the Supreme Court, while acknowledging that the State has an interest in the propagation of morality and civic virtue, affirmed a high view of parental independence.[150] The Court argued that any conflict between parents and the state "over the control of the child and his training" is extremely significant, but especially regarding matters of worldview.[151] The Court held that:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce* v. *Society of Sisters, supra*. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.[152]

Thus, the Court's dicta yet again showed a level of deference to parental rights that can only be maintained by judging the right under a standard of strict scrutiny.[153] Only then will the Court's dicta match current law.

Such a view of parental rights was held by the Supreme Court, at least in dicta if not in practice, until *Troxel*, where the Court revealed the unclear test that had failed to give a distinct standard for how the court should govern its decisions with these issues.[154] This decision, while upholding parental rights, revealed the flaw inherent in the Court's previous parental rights jurisprudence: the Court had never explicitly acknowledged a standard by which parental rights issues should be judged. This lack of clarity as well as the Court's confusion in recent years as to the definition of the family has set up a crisis of parental rights in modern law.[155]

Recent developments in modern law as well as the nature of the family itself have also contributed

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[150] *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166, 168-69 (1944).
[151] *Id*. at 165.
[152] *Id*. at 168-69.
[153] *Id.* at 165-168. (This case clearly presents the conflict between two spheres of authority: the government and the family. The Supreme Court would be wise to reconsider parental rights in light of this case's dicta).
[154] Michael Farris, *The Confused Character of Parental Rights in the Aftermath of Troxel*, PARENTAL RIGHTS FOUNDATION, https://parentalrights.org/get_involved/print-resources/. (Last visited Oct. 9th, 2020).
[155] *Obergefell v. Hodges*, 576 U.S. 644, 666-673 (2015).

to the pressing need for the court to address the question of how best to identify and protect unenumerated rights such as parental rights. Specifically, the redefinition of the family, the rise of state centered views of social development, and the Court's changing jurisprudence on substantive due process have led to the need for the Court to address how best parental rights and other common law rights should be protected. These changes in law, family, and society reveal even more the importance of having a proper framework for identifying and balancing a citizen's rights and responsibilities. Yet, despite this it is clear from the Court's current precedent that, while parental rights has not been treated as a fundamental right in the standard of review applied to the right, it has been acknowledged to be a fundamental right by the Court on numerous occasions.[156]

3. Results of *Glucksberg's* application to parental rights.

Thus, the application of *Glucksberg's* test to parental rights reveals a fundamental right, even if unenumerated. In applying *Glucksberg's* two-part test of defining the right and then providing a historical analysis it is clear that parental rights can be both clearly defined and have long application in U.S. legal history.[157] Parental rights may be easily defined as the "liberty of parents and guardians to direct the upbringing and education of children under their control."[158] The ready ability of the Court to come up with a succinct and clear definition lends credence to the argument that parental rights, although unenumerated, are fundamental.

Application of the second prong of *Glucksberg's* test also shows that parental rights are deeply embedded in the western legal tradition and have always been seen as important. This is seen in the earliest American legal writings with American scholars arguing that parental control over the upbringing

[156] *Pierce*, 268 U.S. at 534-35; *Prince*, 321 U.S. at 168-69.
[157] *Glucksberg*, 521 U.S. at 720-22.
[158] *Pierce v. Soc. Of Sisters*, 268 U.S. at 534-535.

of their children was preeminent.[159] This view of parental rights has also been upheld in dicta by the Supreme Court on multiple occasions with the Court arguing that parents are given the preeminent responsibility to raise their children and the State may not infringe on this relationship other than in the most severe circumstances.[160] Thus, this historical analysis of parental rights reveals that the rights of parents are part of the "basic values that underlie our society."[161]

Thus, parental rights meets *Glucksberg's* two-pronged test of being easily definable and backed by history and tradition.[162] Because of this, parental rights should be afforded the highest and strictest standard of protections because it has been proven to be "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[163] Being a fundamental right, parental rights should be governed using a strict scrutiny framework and any balancing of state interests with the right should weigh heavily in favor of the right such that it would take a compelling governmental interest to overcome the presumption in favor of parental rights.[164]

Many have argued that unenumerated rights such as parental rights should be enumerated through constitutional amendment or statutory enactment.[165] While this would be helpful and provide clear protections for these rights as well as providing an opportunity for a spirited social debate on such issues, with rights that are fundamental, there must be a stopgap mechanism to provide immediate and realistic protection without resorting to the uncertainty of the political process. However, the nature and danger of judicial power calls for a careful and limited test that can meet that challenge.

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[159] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW, * 186.
[160] *Prince*, 321 U.S. at 168-69.
[161] *Moore,* 431 U.S. at 503-506.
[162] *Glucksberg*, 521 U.S. at 720-22.
[163] *Snyder*, 291 U.S. at 105.
[164] *Glucksberg*, 521 U.S. at 720-22.
[165] The Author is in favor of a parental rights amendment to the United States Constitution as he believes this to be the only way to provide lasting protection for the fundamental right. However, substantive due process is a good stopgap until that goal can be accomplished.

However, not only should the Court apply *Glucksberg's* test to parental rights to hold it a fundamental right, but the Court should expand its use of the test to all unenumerated rights. If this was done, a more coherent view of substantive due process would emerge as rights were carefully defined and subjected to a historical analysis to determine whether they were fundamental in nature. This would clarify and limit application of substantive due process to only those rights that can be defined and then shown by historical analysis to be "deeply rooted" in the "history and tradition[s]" of the American people.[166]

VI. Conclusion

In conclusion, when afforded proper deference through application of *Glucksberg's* history and tradition test, it becomes clear that, although unenumerated, parental rights are a fundamental right. The Supreme Court should revise its interpretation of substantive due process to use *Glucksberg's* clear two-part test for any unenumerated rights question arising under the substantive due process framework. This will clarify unenumerated rights and allow the Court to properly define them and set their correct scope. When this is done, parental rights should be afforded proper deference as a fundamental right and be governed under a standard of strict scrutiny.[167]

This note has overviewed the Court's current framework for substantive due process and shown that while the Court has posited a clear and coherent history and tradition test for defining and clarifying fundamental, unenumerated rights, it is inconsistently used and often the Court is more concerned with issues of personal autonomy than what the law is.[168] This has greatly affected fundamental rights jurisprudence and left lower court's confused with what exactly is a fundamental right and how to define

[166] *Glucksberg,* 521 U.S. at 721 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).
[167] *Troxel,* at 80 (Thomas, J. concurring).
[168] *Glucksberg,* 521 U.S. at 727.

and determine the scope of such rights. Further, since parental rights, as most fundamental rights questions do, touch on key values debates within society, it is imperative the Court have a clear test to follow in defining and setting the scope of fundamental unenumerated rights.

The Court's substantive due process jurisprudence has led to great good as the fundamental unenumerated rights of American's have been protected under the doctrine. However, as is the case with parental rights, at times there has been confusion with the Court's stance on a right and how lower courts should interpret or apply said rights.[169] As legal scholars struggle with the question of whether the doctrine itself is inadequate or it is simply a matter of inadequate application of the test to certain areas of the law, the *Glucksberg* history and tradition test should provide a way forward on parental rights and all other unenumerated rights questions.

Under this standard, a right would first be carefully defined and then that definition alone would undergo a historical analysis to determine whether it truly is a right.[170] Careful definition of parental rights and historical analysis of it under *Glucksberg's* standard reveals that the right should be protected as fundamental and governed under a strict scrutiny standard. The Court should reconsider its parental rights jurisprudence under *Glucksberg's* standard to make application of the right more consistent with its own dicta and with a coherent application of substantive due process. Application of this test would provide a stricter and more workable theory of substantive due process especially when applied to unenumerated rights.

[169] *Hodge v. Jones*, 31 F.3d at 164.
[170] *Wash. v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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September 12, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, Virginia 23219

Dear Judge Hanes:

I am thrilled to be applying for your term law clerk position beginning in August 2021. My work with the Charlotte Business Court this summer has shown me the importance of the clerks both because of their mastery of the cases that come to the Court, and also their mentorship of the interns. At the Business Court, I enjoyed my discussions with both Judge Bledsoe and Judge Conrad about the opinions I was tasked to draft, and I believe that my work made a positive contribution to the Court. Similarly, if given the opportunity, I would take ownership of the cases handed to me and be an asset to your Chambers.

My experience as Managing Editor of the Journal of Business and Intellectual Property also makes me qualified to be a law clerk. In this role I have two primary responsibilities: finalizing every article before publication and overseeing each component part of the editing process. Finalizing an article requires a strong attention to detail, an excellent grasp of grammar rules, and a mastery of the bluebook. Overseeing the full editing process requires organization, the ability to manage multiple articles at one time, and clear communication with board members in order to ensure each step is done efficiently.

In this position I have learned the importance of getting something right the first time. The Managing Editor is the last line of defense with an article, which by that point a dozen people have read and edited. Still, articles often come to me with errors and mistakes. While this is frustrating, this process has shown me how important it is to do each step well. If every person in the chain does their part with care, it creates a more efficient process, and, ultimately, a more polished work product.

As your clerk, I would work diligently every day to do the necessary research, make creative and effective arguments, check for grammar mistakes, and ensure that I am the strongest link in the chain.

Thank you for taking the time to consider my application, and I look forward to the opportunity to further discuss my qualifications.

Sincerely,
Liz Pomeroy

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Class of 2016 **DAVIDSON COLLEGE** Davidson, NC
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LEADERSHIP EXPERIENCE

March 2020-Present **MANAGING EDITOR** Winston Salem, NC
Journal of Business and Intellectual Property
- Oversee the editing of each article, including delegating tasks to executive editors and making ultimate editorial decisions
- Finalize and format four issues (which consist of four articles each) for publication
- Work with the Editor-in-Chief to coordinate board meetings and handle problems as they arise

Fall 2019, 2020 **TORTS TEACHING ASSISTANT** Winston Salem, NC
- Assisted Dean Cardi with grading written assignments; hold office hours for first-year students

Fall 2019 **ACADEMIC ENGAGEMENT PROGRAM LEADER - TORTS** Winston Salem, NC
- Met with six first-year students each week to clarify topics of confusion and discuss exam preparation

2012 - 2016 **WARNER HALL HOUSE** Davidson, NC
Head of Fundraising (2015)
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PROFESSIONAL EXPERIENCE

May 2020-June 2020 **BRADLEY ARANT BOULT CUMMINGS** Charlotte, NC
Summer Associate
- Conducted legal research and drafted memoranda for attorneys in the business litigation and intellectual property practice groups

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- Attended mediations, hearings, depositions and client meetings

July 2016-July 2018 **WOMBLE BOND DICKINSON** Charlotte, NC
Real Estate Paralegal
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- Drafted legal documents for use in large real estate loans, sales, purchases and other transactions

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August 2019-March 2020 ***Pro Bono Projects Executive Board - Communications Coordinator***
- Managed a weekly newsletter and Facebook page for pro-bono events and projects
- Worked with the Executive Board to further project goals

August 2018-August 2019 ***Expungement Clinic***
- Met one-on-one with clients to discuss the possibility of expunging their record
- Read and interpret the North Carolina expungement statute and apply it to each client's case

Lawyer on the Line
- Conducted client interviews, research legal issues, consult with a supervising attorney, and send client's case to Forsyth County Legal Aid when completed

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Legal Analysis, Writing and Research I	Christine Coughlin	A	2	
Civil Procedure I	Wendy Parker	A-	3	
Criminal Law	Steve Friedland	B+	3	
Torts	Jonathan Cardi	A	4	
Contracts I	Steve Nickles	B+	3	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Property	Dick Schneider	B	4	
Constitutional Law	Shannon Gilreath	B	3	
Civil Procedure II	Wendy Parker	A-	3	
Legal Analysis, Writing and Research II	Christine Coughlin	A-	2	
Contracts II	Steve Nickles	B+	3	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
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Evidence	Steve Virgil	A-	4	
Legislative and Administrative Law	Margaret Taylor	A-	3	
State and Local Government	Don Vaughan	A	2	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Drafting	Jaya Gokhale	CR	2	
Litigation Drafting	Russell Gold	CR	3	
Taxation: Federal Income	Rebecca Morrow	CR	4	
Sports Law	Timothy Davis	CR	2	
Journal of Business and Intellectual Property Law	N/A	CR	2	
Secured Transactions	Steve Nickles	CR	3	

The Spring 2019 semester went to a Credit/No Credit system because of the Covid-19 pandemic. A designation of "CR" denotes credit received for the course

WAKE FOREST UNIVERSITY
SCHOOL of LAW

August 28, 2020

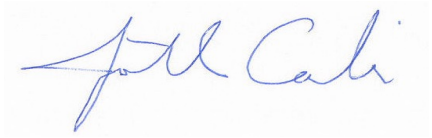
Dear Judge:

I write to recommend Liz Pomeroy for a position as law clerk in your chambers. Liz was a star student in my Torts class and has served for two years as the Teaching Assistant for my Torts class. Liz is an excellent Teaching Assistant. One of her tasks in this role is to take a first stab at grading the students' five writing assignments, which include such practice-oriented tasks as drafting a complaint, a waiver of liability, and jury instructions. Liz is perceptive, constructive, and consistent (which is more difficult than it seems!) in her comments on student writing and analysis. Students also rave about the clarity and patience with which she answers their questions during office hours. I could be more thrilled to have Liz as my constant aid in Torts.

One of Liz's many strengths as a student is her ability to write clear, organized, and moving arguments. I have seen many examples of Liz's writing—in Torts, as a TA, and in her law review Comment. In each case, Liz proved unusually adept. Liz wrote her Comment on the litigation attempting to re-appropriate art lost to the Nazis. Liz addressed a rather vague area of the law—what constitutes duress. The article is beautifully written (not praise I offer lightly)—its quality far above that of typical student work—and her analysis is excellent. She climbs what I see as a steep hill in arguing that works sold (at depressed prices) by families seeking money to relocate ought to be treated as having been sold under duress. There is no question, of course, that such families felt duress, but the duress did not typically stem from the actions of the particular purchaser. Nevertheless, Liz makes a compelling argument that within this narrow historical context, duress must be understood more broadly. Rarely do I read a student article in such rapt attention—it was Liz's writing that captured me.

I believe that Liz will be a superb judicial clerk, just the type of person I would want working in my chambers were I a judge. On a personal level, Liz is professional, reliable, and delightful to be around. I hope that you have the chance to meet her. If you have any questions about Liz, please don't hesitate to contact me.

All the best,



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September 12, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to wholeheartedly recommend Liz Pomeroy for a clerkship in your chambers. Liz and her partner wrote the very best brief in my Litigation Drafting class last semester, and Liz was a stellar contributor to the course throughout. I had the privilege of talking with Liz many times during office hours and working our way through the complicated analysis that the course required. Her analytical ability is extraordinary, and so too is her ability to understand complex social dynamics.

To offer some context, I taught Litigation Drafting using a single case throughout the semester in which students have to build a factual record through interviews and written discovery to support either a motion for class certification or opposition to such a motion that they write late. They work with the same partner and against the same opponents throughout the semester.

It was a great pleasure to have Liz in my class. Liz writes with incredible clarity, brevity, and precision. She uses that brevity to craft a compelling narrative through thoughtful and careful strategic choices in a way that far exceeds her peers. In the course Liz represented plaintiffs seeking certification of a nationwide class in a discrimination case after *Wal-Mart*—a tall order, to be sure. In one particularly memorable part of her brief, Liz used a very careful read of documents secured in discovery to demonstrate a widespread culture of discrimination across the defendant's organization. In a single sentence she showed deeply ingrained sex stereotyping by numerous supervisors affecting numerous employees; she did so with very carefully chosen examples that she assembled and aligned thoughtfully and strategically. She avoided the temptation to which so many law students succumb to overuse adjectives but instead simply let the facts and law speak for themselves once carefully arranged and precisely explained.

Liz is far better than her peers at connecting the legal complexities and the nuances of the case law with our case's fact pattern at an incredible level of specificity. Liz's ability to navigate a very complicated fact pattern and consider how to traverse the somewhat-hostile case law landscape was thoroughly impressive. Her success began by building a very detailed factual record. It continued through very careful efforts to shape a narrative that the defendant employed a single decision-making entity —quite unlike the numerous managers at Wal-Mart. Although plaintiffs in such cases face long odds, they would be well served to have lawyers with Liz's considerable talents. She did an exceptional job drawing out the specific facts of each of the relevant cases and then drew richly detailed factual analogies and distinctions between the facts of our case and the precedent. I have seen fewer than a handful of students in eight years of teaching so convincingly situate their facts in the relevant case law. That skill set will translate incredibly well into a clerkship, it seems to me.

The most difficult part of my students' job in Litigation Drafting—at least for those who represent the plaintiff—is to craft a theory about the defendant's operations that encompasses all of the putative class including those employees who were never actually considered for promotion. Indeed, the vast majority of students on that side of the case never even realize this potential weakness in their case. But Liz and her partner realized that vulnerability early in the semester and spent a great deal of time researching and developing a factual record to sweep in the entire putative class. Liz and her partner developed very specific factual allegations and aligned them with the case law exceptionally well to show that the single decisionmaker constricts the pipeline through particular practices and thus that its reach extends far beyond simply voting on candidates who are put up for promotion. Liz's brief did an excellent job providing the judge with a careful and detailed way in which to rule in her client's favor.

Liz works incredibly hard. While many of my students are content to do their reading and participate in class discussions, Liz came to office hours numerous times to talk through some of the most difficult analytical challenges that the course poses. Indeed, even once the course moved online and became ungraded because of the pandemic, Liz reached out many times to talk with me about arguments she wanted to raise or ways to navigate seemingly contrary precedent. That her incredible effort continued even without grade pressure spoke volumes about Liz's work ethic.

Those in-person and Zoom meetings showed me just how rich and complex of a thinker Liz is. My approach is quite non-directive, so it was her stellar analytical ability that made these meetings so productive. I prefer to teach legal writing courses using difficult materials because it allows me to prepare my students to work in complex areas of law. That level of difficulty allowed Liz to stand out quite clearly from her peers. But I was not surprised to see her thrive in those one-on-one discussions. In the classroom, Liz always thought through the twists and turns of the analysis well before and at a greater level of detail than most of her colleagues. When we looked at examples of briefs or declarations to understand the strategic lawyering choices, Liz

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was consistently the best and most thoughtful contributor to those discussions.

Peer critique is an important facet of my courses, and it is yet another place where Liz excelled. At her peer critique conference for Litigation Drafting, there were several occasions where Liz offered her classmates exactly the feedback on their work that I had planned to offer. She effectively diagnosed problems with her colleagues' arguments and offered them concrete and impressive ways to address those problems. This ability to improve colleagues' work will serve her very well in any chambers with a collaborative workflow amongst the clerks.

Liz's organization and professionalism are exceptional. My Litigation Drafting course requires students to set and manage their own deadlines throughout the semester; Liz always knew what she wanted to complete when. She had clearly mapped out the entire schedule for her case in a way that is quite unusual for law students. Indeed, I was not at all surprised to see Liz become Managing Editor of the Journal of Business and Intellectual Property Law. Her skill set fits that job extraordinarily well. She is excellent at understanding the big picture of a task and breaking it into component parts before scheduling each part. She must have excelled as a paralegal because of her organizational skills and ability to manage a project.

From her earliest days as a law student, Liz has demonstrated a commitment to using her law degree to help others. She has spent significant time doing pro bono work, particularly in the expungement clinic. She realized what a substantial effect she could have on clients' lives by using her skills to help remove obstacles to their employment. Liz kept up that pro bono work even as her other work continued to get busier as a teaching assistant and a leader in the Academic Engagement Program.

On both a personal and professional level, Liz is extremely easy to work with and get along with. She carries herself with a level of professionalism and has a work ethic far beyond her peers. It was a great joy to have Liz as my student. I'm very pleased to recommend Liz for a clerkship in your chambers. If you would like additional information, please feel free to contact me on my cell phone at 202-725-4120 or at rgold@law.ua.edu.

Very truly yours,

Russell M. Gold
Associate Professor of Law
University of Alabama School of Law

ELISABETH 'LIZ' K. POMEROY
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WRITING SAMPLE

The attached writing sample is comprised of the introduction, analysis and conclusion of a comment that I submitted in the Fall of 2019 to the Wake Forest Journal of Business and Intellectual Property Law. This sample is based on my own research and is wholly my own writing, without editing by another.

Expanding the Definition of Duress in the
Holocaust Expropriated Art Recovery Act of 2016

I. Introduction

The restitution of Nazi-looted artworks has become a prevalent topic in both the news and media, largely due to movies such as "Monuments Men" and "Woman in Gold." Behind the scenes, however, are real lives, real stories, and oftentimes a desperate attempt to reclaim lost artworks. The crimes that took place over a 12-year period in Europe stretched beyond violence, persecution, and ostracism. It was a systematic takeover of the property and rights of all Jewish individuals and families. Since 1945, the United States has made substantial efforts to rectify the actions taken by the Nazis, but the country is limited in what it can do because of the narrow definitions imposed by current restitution laws.

Over the past eighty years, there has been a tremendous amount of litigation in an attempt to recover the art stolen by the Nazis. These claims have been centered around choice of law provisions (when foreign descendants are claiming superior title to work that is presently in the United States),[1] and statute of limitations issues. However, the issue of duress is also prevalent in the majority of these cases. Many individuals and families were physically forced to sell their artworks to Nazi officials, many had their property physically seized, and many others liquidated their assets in order to have enough money to flee their home countries. While the first two situations satisfy the element of a wrongful threat in the state cause of action for replevin, the third does not fall under the traditional definition of "duress," barring many plaintiffs from recovering.

Currently, the statute of limitations for Nazi-looted artwork restitution claims in the United States is governed by the Holocaust Expropriated Art Recovery Act of 2016. This Act creates a uniform standard that individuals, estates, and businesses can adhere to while also

giving claimants a fair opportunity to litigate their claims. However, duress is not defined in this Act, and it is thus left to each state to determine whether the facts of a case present elements of a forced sale.[2] During the Nazi takeover, the duress that families felt was different from anything seen in run-of-the-mill contracts issues, and is deserving of a different standard. Thus, just as the Holocaust Expropriated Art Recovery Act of 2016 set a uniform statute of limitations for Nazi-looted art recovery claims, duress should also be governed by a different, uniform and national standard.

Through this article and the analysis of the current state of Holocaust restitution laws in the United States, it will become evident that state laws are not allowing worthy plaintiffs to recover. An amendment adding a definition of duress to the Holocaust Expropriated Art Recovery Act of 2016 would encompass claims that would otherwise be dismissed under current state laws.

II. Analysis

A. Factual Differences Become Outcome Determinative

In all three cases, the plaintiffs were Jewish heirs that filed claims for replevin and conversion for artworks stolen by the Nazis in the 1930s. In *Zuckerman* and *Reif*, the courts applied New York law, where, to void a contract on the ground of economic duress, a plaintiff must show that the contract was procured by means of (1) a wrongful threat that (2) precluded the exercise of free will. Furthermore, the law is construed even more narrowly, as the defendant must have been the one that caused the duress.[3] In *Zuckerman*, the threat the Leffmans felt came from the fear for their own lives, not from the other party in the transaction, nor directly from the Nazi party.[4] Thus, the circumstances did not satisfy New York's economic duress law.[5] In *Reif*, the outcome was drastically different because the threat to Grunbaum came directly from the

Nazi party while he was imprisoned. There was an aspect of immediacy that Grunbaum felt to sign the power of attorney because if he did not do so, he would have suffered instantaneous consequences. While no such immediacy was felt by the Leffmans, that did not diminish the real fear that they felt, prompting them to flee the country.

Similar to the New York cause of action for replevin, in Rhode Island a party must prove (1) that it is the lawful owner of the property, (2) that the property was taken unlawfully, and (3) the defendant wrongfully has possession of the property.[6] In *Vineberg*, Nazi officials sent letters directly to Dr. Stern, forcing him to liquidate his collection and consign it to a Nazi-approved auction house.[7] The court found that there was no question that the Nazis unlawfully took Dr. Stern's property because they forced him to sell directly to the Nazi party.[8] Similar to *Reif*, there was direct pressure from Nazi officials to sell and transfer the artwork, prompting the court to conclude that there was a wrongful transfer.[9]

In contrast to *Vineberg* and *Reif*, the Leffmans in *Zuckerman* fled because the general circumstances in Europe caused them to feel threatened and unsafe in their own country, even though there was no direct threat that prompted them to sell. Thus, the descendants of the Leffmans could not recover under the contractual definition of economic duress. The consequence of this limited definition is that it fails to consider that the Leffmans and many other Jewish families were targeted, ostracized, persecuted, and most likely would have lost their lives had they not liquidated and attempted to escape.[10]

As exemplified by these three cases, inquiry into the sale of property during the Nazi regime is a highly fact-specific inquiry; a minor change in any of the factual circumstances can be outcome determinative, creating a disparity among decisions in this type of case.

B. An Old but New Solution

The version of the HEAR Act that was proposed to the Senate in 2016 was substantially similar to the final HEAR Act: both extended the statute of limitations to six years; both covered looting between January 1, 1933 and December 31, 1945; both outlined the purposes of the Act; and both gave concrete definitions for "actual discovery," and "artwork or other cultural property."[11] However, the fundamental difference between the Senate bill and the final version was the ultimate exclusion of the definition for "unlawfully lost."[12] The Senate bill defined this as including "any theft, seizure, forced sale, sale under duress, or any other loss of an artwork or cultural property that would not have occurred absent persecution during the Nazi era."[13] The final version of the Act, however, lacked any definition of "unlawfully lost." The legislative history of the HEAR Act did not give a reasoned explanation for this change – it merely showed that in April of 2016, the bill proposed to the Senate included the definition, but in September of that same year, the bill proposed to the House did not include it.[14] This could have been the result of internal compromises or external lobbying efforts, but no conference nor committee report was created that explained the reasonings.[15]

The intentional exclusion of this phrase has created inconsistency within Nazi-era restitution claims because there is no all-encompassing definition for duress. The purpose of the HEAR Act was to give claimants a fair opportunity to litigate their claims and recover their artworks, but by omitting this national standard, the legislature created a discrepancy that is based solely on the factual circumstances in each case, as seen in *Zuckerman*, *Reif* and *Vineberg*.

Further, the HEAR Act was intended to be a reaffirmation of the principles in existing law, which, as established in the Terezin Declaration, included the definition of wrongful seizure of property.[16] In order to fully and effectively incorporate the existing law into the HEAR Act,

there should be a definition for what constitutes a wrongful seizure that includes all types of transactions and sales that occurred from 1933 to 1945.

Thus, the following language would cure this discrepancy in outcomes: "UNLAWFULLY LOST. – the term 'unlawfully lost' includes any theft, seizure, sale under duress, forced sale, sale or liquidation of assets in the form of artwork or other cultural property made in anticipation of escape or change of domicile, or any other loss of an artwork or cultural property that would not have occurred absent persecution during the Nazi era."

The addition of the phrase "sale or liquidation of assets in the form of artwork or other cultural property made in anticipation of escape or change of domicile" would enhance the efficacy of the Act as it would encompass situations such as the one encountered in the *Zuckerman* case. There, the court found that the plaintiff failed to adequately allege duress because the Leffmans sold their artwork as a result of the general economic and political circumstances.[17] The Leffmans then used the money from this sale to escape,[18] which should be taken as evidence that they desperately needed the money from this liquidation. In addition, the incorporation of the words "in anticipation of" would include situations where a family or individual took substantial steps to flee, but were arrested, detained, or were otherwise prevented from doing so.

While this proposed definition for "unlawfully lost" is broader than what was originally proposed to the Senate, it is not an unreasonable amendment considering the circumstances that occurred between 1933 and 1945. Those twelve years consisted of the greatest theft in history, and some of the worst persecution the world has seen. Families and individuals were desperate to flee Germany, Austria, and even the surrounding countries because of the Nazi influence. While many of these people were not imprisoned, nor were they forced to sell their assets from

the confines of a death camp, they nevertheless needed quick money to be able to escape the country. However, the current state of laws does not provide a remedy for the descendants of these families solely because the standard for duress used in these claims only covers certain types of factual situations.

C. Comparable Voidable Transactions

Adding this definition for "unlawfully lost" would not be the first time that the law has created carve-outs for improper transactions.[19] There are several instances in transfers between debtors and creditors that a court may void a transaction if it finds that it was unfair to the parties or done improperly. If these concepts were to be applied to Nazi-era restitution claims, it becomes evident that those transfers would also be voided.

i. Bankruptcy – Claw-Back Provision

Bankruptcy law provides for a clawback provision if transfers were made within ninety days of filing for bankruptcy.[20] Under 11 U.S.C. § 547, the "trustee may avoid any transfer of an interest of the debtor in property […] made on or within ninety days before the date of the filing of the petition […] that enables such creditor to receive more than such creditor would receive if […] the transfer had not been made."[21] This, in effect, states that when a debtor pays a creditor and then files for bankruptcy within ninety days, the court may order that the creditor pay back the debtor. The purpose of this is to ensure that all creditors are treated fairly in a distribution of assets from the bankruptcy court, and to ensure that actions taken in anticipation of bankruptcy do not prefer one creditor over another.[22] While this clawback provision is meant to protect creditors, parties have been known to preemptively act in an attempt to prevent an inequitable result, or to protect their own assets.[23]

This concept is easily transferrable to restitution claims for Nazi-looted artworks. If a party liquidated its assets during the Nazi regime, then attempted to flee the country, there is a strong possibility that the liquidation was done in anticipation of needing money to relocate. Thus, this sale would be strong evidence that the party felt as though it had no choice but to sell its possessions. This would be deemed an inequitable sale because it was done in an attempt to gain protection and prevent what would happen if they stayed in a Nazi-controlled country, and, if borrowing the clawback provision, the sale would be voided.

ii. Uniform Voidable Transactions Act

In other debtor-creditor transactions, the Uniform Voidable Transactions Act (the "UVTA"), which has been enacted in 43 states,[24] aims to avoid transfers that were made in exchange for less than a reasonably equivalent value.[25] It states that:

> [A] transfer or obligation incurred by a debtor is voidable as to a creditor […] if the debtor made the transfer or incurred the obligation […] without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor […] was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business transaction.[26]

This provision provides relief for parties that were not given fair compensation for a transaction, and were as a result either left completely insolvent or with very few assets.[27]

Many sales from 1933 to 1945 would be voided if using this reasoning. During the Nazi regime, much art was "subjected to forced sales for prices significantly below market value (if any value ever actually materialized for the seller)."[28] This expropriation of property created an artificially depressed art market[29] because if parties had instead sold their collections in other

countries or under reasonable conditions, the prices realized would have been much higher.[30] However, because parties were forced to sell to a particular buyer, or even forced to hand over their property without compensation,[31] these transactions would be voidable under UVTA.

D. Potential Repercussions

Providing this definition for "unlawfully lost" would allow more claims to be heard, and would thus make museums vulnerable to a substantial amount of litigation. This could potentially result in courts directing museums to return a significant number of pieces. In 2008, Sir Norman Rosenthal, the former exhibitions secretary of the Royal Academy, rather emphatically opined that Nazi-looted art should not be returned, believing that "history is history and that you can't turn the clock back, or make things good again through art."[32] Keeping pieces in public collections and on public display could inspire children to get involved with culture and arts, an opportunity that would not be available if public collections were gutted, and famous works tucked away in a private collection.[33] Thus, public museums argue that restitution laws should be more strict, and claimants must have the "strongest of reasons" for why a piece should be returned.[34]

The ethics and morals behind restitution claims, however, tip the scales in favor of more lenient laws. While the general public has an interest in being educated and cultured, there should be an even greater interest in "the rule of law, the respect for individual rights to property, the observation of individual freedoms and […] the prohibition against the use of force against any particular ethnic or religious group."[35] Displaying stolen artwork passively implies that the museum tolerates the actions that led to the museum's possession of it, which would, in turn, educate children to have little respect for legal or moral values.[36]

III. Conclusion

Since 1945, substantial progress has been made to atone for the looting and plundering that took place during the Nazi regime, but the United States legislature has not done everything within its power. Adding a definition for "unlawfully lost" would fill a gap in a field of law that plays a significant role in the art market, business, and contract law. This definition is not so broad that it would flood the courts with new, and sometimes unworthy claims, but rather it would give families an opportunity to reclaim what is rightfully theirs. Since it is seldom that an individual or family would voluntarily liquidate their prized possessions and relocate to a new country, expanding the Holocaust Expropriated Art Recovery Act of 2016 to include these sales would formalize a uniform, national standard, and provide some relief to the survivors of the greatest theft in history.

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[1] *See* Vineberg v. Bissonnette, 548 F.3d 50 (1st Cir. 2008); *see* Gowen v. Helly Nahmad Gallery, Inc., 60 Misc.3d 963 (N.Y.S.3d 2018).

[2] *See* Holocaust Expropriated Art Recovery Act of 2016, 22 U.S.C.A. § 1621 note (2016).

[3] "[P]ressure, when not caused by the counterparties to the transaction (or the Defendant) where the duress is alleged, is insufficient to prove duress with respect to the transaction." Zuckerman v. Metro. Museum of Art, 307 F. Supp. 3d 304, 319 (S.D.N.Y. 2018).

[4] Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 189-90 (2d Cir. 2019).

[5] Brief of Amici Curiae the 1939 Society and Bet Tzedek in Support of Plaintiff-Appellant and Reversal of the District Court at 14, Zuckerman v. Metro. Museum of Art, 928 F.3d 186 (2d Cir. 2019) (No. 18-634), 2018 WL 3024437.

[6] Vineberg, 529 F. Supp. 2d at 306.

[7] *Id.* at 302-03.

[8] *Id.* at 308.

[9] *Id.* at 307.

[10] Brief of Amici Curiae the 1939 Society and Bet Tzedek in Support of Plaintiff-Appellant and Reversal of the District Court at 15.

[11] S. 2763, 114th Cong. (2016); H.R. 6130, 114th Cong. (2016).

[12] *See* Barnes, *supra* note 44, at 629.

[13] S. 2763 § 4(4).

[14] *Id.*; H.R. 6130.

[15] The absence of a report in ProQuest Congressional, ProQuest Legislative Insight, govinfo.gov, WestLaw and LexisNexis is evidence that a committee report was not created.

[16] *Prague Holocaust Conference: Terezin Declaration*, *supra* note 46.

[17] Zuckerman v. Metro. Museum of Art, 307 F.Supp.3d 304, 319 (S.D.N.Y. 2018), *aff'd*, 928 F.3d 186 (2d Cir. 2019).

[18] *Id.* at 189-90.

[19] *See, e.g.*, UNIF. FRAUDULENT TRANSFER ACT § 1-12 (UNIF. LAW COMM'N 1984) (amended by UNIF. VOIDABLE TRANSACTIONS ACT § 1-15 (UNIF. L. COMM'N 2014)).

[20] 11 U.S.C.A. § 547(b) (West 2005).

[21] 11 U.S.C.A. § 547(b).

[22] *See, e.g.*, Stern v. Marshall*,* 564 U.S. 462, 496 (2011).

[23] *See, e.g.*, In re Chandler, 441 B.R. 452, 460 (Bankr. E.D. Pa. 2010) (finding that, since the debtor filed a petition for bankruptcy in an attempt to prevent the sale of his property, as it was his principal source of income, the sale of property should not go forward).

[24] *Uniform Voidable Transactions Act Approved by Uniform Law Commission to Replace UFTA*, JONES DAY, https://www.jonesday.com/en/insights/2014/10/uniform-voidable-transactions-act-approved-by-uniform-law-commission-to-replace-ufta (last visited Nov. 14, 2019).

[25] *Id.*

[26] UNIF. VOIDABLE TRANSACTIONS ACT § 4(a)(2)(i).

[27] In re LXEng LLC, No. 13-51144, 2019 WL 4146478, at *24 (Bankr. D. Conn. Aug. 30, 2019) (applying the Uniform Fraudulent Transfer Act, which has identical language in § 4(a) to that of the Uniform Voidable Transactions Act) (holding that the debtor made the transfers in exchange for less than a reasonably equivalent value when her affairs were in disarray, and thus the transfers were deemed to be constructively fraudulent and voided).

[28] Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37, 49 (2009).

[29] *Id.* at 49-50.

[30] The art market in New York "continued to function even as fighting raged in Europe." *Id.* at 49, n.62 (quoting Adam Zagorin, *Art: Saving the Spoils of War*, TIME (Dec. 1, 1997), http://content.time.com/time/magazine/article/0,9171,987472,00.html).

[31] *See, e.g.*, Vineberg v. Bissonnette, 529 F. Supp. 2d 300, 303 (D.R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir. 2008).

[32] Norman Rosenthal, *The Time Has Come for a Statute of Limitations*, THE ART NEWSPAPER, https://www.lootedart.com/NFVA1Y581441 (last visited Nov. 14, 2019).

[33] *Id.*

[34] Jonathan Jones, *Should All Looted Art Be Returned?*, *THE GUARDIAN (Jan. 9, 2009), https://www.theguardian.com/artanddesign/jonathanjonesblog/2009/jan/09/looted-art-norman-rosenthal.*

[35] Dr Kwame Opoku**,** *Response to Jonathan Jones: "Should All Looted Art be Returned?"*, THE GUARDIAN (Jan. 13, 2009), https://www.lootedart.com/NFVA1Y581441.

[36] Kreder, *supra* note 151 at 45 (quoting several members of the House of Lords in response to Sir Norman Rosenthal's article).

Applicant Details

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Applicant Education

BA/BS From	**University of California-Santa Cruz**
Date of BA/BS	**June 2014**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 15, 2019**
Class Rank	**33%**
Law Review/ Journal	**Yes**
Journal(s)	**The George Washington International Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**The George Washington University Law School First-Year Moot Court Skills Competition** **Van Vleck Constitutional Law Moot Court Competition**

Bar Admission

Admission(s) **District of Columbia**

Prior Judicial Experience

Judicial Internships/ Externships **Yes**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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August 21, 2020

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr. Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am writing to apply for a clerkship in your chambers for the 2021–23 term. I earned my law degree with honors from the George Washington University Law School in 2019 and I am currently practicing as a litigation associate attorney at a legal startup company in Washington, DC.

Throughout law school, I placed extensive emphasis on legal research and writing. I served as a legal writing tutor for two years, first as a Writing Fellow then as a Dean's Fellow during my second and third years, respectively. My responsibilities for those positions included working closely with individual students to assist them in drafting and editing court documents and long form academic works, teaching a class of first-year law students the basics of legal research and writing as well as grading their work product, and assisting the George Washington Law Writing Center to develop and revise legal writing assignments. As a member of the Article Selection Committee for *The George Washington International Law Review*, I recommended, edited, and cite-checked articles for publication. In order to gain additional practical experience and cover the costs of law school, I also secured litigation internships during my second and third academic years, where I was afforded invaluable opportunities to contribute to substantive matters in cases before federal district courts, state trial and appeals courts, and federal agencies.

My résumé, law school grade sheet, and writing sample are enclosed. Letters of recommendation from the George Washington University Law School professors DeSanctis and Wolson will follow. Please let me know if I can provide any additional information.

Thank you for your time and consideration.

Sincerely,

Rosalia Quam-Wickham

ROSALIA QUAM-WICKHAM

2630 Adams Mill Road NW, Apt. 307, Washington, DC 20009
(562) 310-5088 • rquam@law.gwu.edu

EDUCATION

The George Washington University Law School, Washington, DC
J.D. with honors, May 2019. GPA: 3.459
Thurgood Marshall Scholar: Top 16–35% of Class

Activities:

- *Associate*, The George Washington International Law Review
- *Associate*, Article Selection Committee for The George Washington International Law Review
- *Dean's Fellow*, The George Washington University Law Legal Research & Writing Program
- *Scholarly Writing Fellow*, The George Washington University Law Writing Center
- *Tutor for Course 6230 – Evidence (Skills)*, The George Washington University Law School
- *Semi-Finalist*, First-Year Moot Court Skills Competition

University of California, Santa Cruz, Santa Cruz, CA
B.A., in Philosophy and European History, June 2014

EXPERIENCE

LEGAL INNOVATORS, Washington, DC — September 2019 to present
Litigation Attorney

- Researched and drafted memoranda analyzing exclusions to limitation of liability provisions and construction project owners' rights to withhold payment to general contractors under Nevada commercial construction law.
- Wrote memoranda and strategized for potential challenge to agreement awarded under District of Columbia Public-Private Partnership Act.
- Evaluated commercial insurance policies and coverage considerations implicated by the COVID-19 pandemic with a focus on business interruption and general commercial insurance clauses.
- Authored four District of Columbia Freedom of Information Act and accompanying fee waiver requests.
- Represented divorce and custody client in the Family Court Operations Division of the District of Columbia Superior Court (*pro bono*).

FIX THE COURT, Washington, DC — Spring 2019
Law Clerk

- Conducted comprehensive survey of 50+ high profile cases before the United States Courts of Appeals concerning reproductive rights, the 2020 United States census, Executive Orders 13769 and 13780, the proposed southern border wall, and the foreign and domestic emoluments clauses of the United States Constitution.
- Investigated possible codes of ethics violations in conjunction with requests from major news outlets and Congressional committees.
- Produced abstracts on transparency and accountability in the federal judiciary, including live broadcasting of oral arguments and term limits.

MCADOO GORDON & ASSOCIATES, Washington, DC — Fall 2018
Law Clerk

- Wrote motion to dismiss indictment for unlawful transportation of a firearm in the District of Columbia (D.C. Code § 22-4504.02).
- Drafted sentencing memorandum and objections to presentence investigation report, pursuant to Fed. R. Crim. Pro 32(e), following convictions for violations of 18 U.S.C. § 1001 in the United States District Court for the District of Columbia.
- Assessed and drafted appeals to the Defense Office of Hearings and Appeals for denials of federal security clearances pursuant to National Security Adjudicative Guidelines B, E, F, G, H, I, and K.

HARVARD LEGAL AID BUREAU, Cambridge, MA — Summer 2018
Summer Counsel

- Served as primary counsel for ~15 cases representing indigent community members in housing and wage & hour cases before the Eastern Division of the Housing Court and the Central Division of the Boston Municipal Court in Boston, MA.
- Composed motions for reconsideration, sanctions, emergency temporary protective orders, and to compel discovery related to nonpayment and for-cause summary process cases and accompanying civil cases.
- Generated settlement agreements, affidavits, and discovery documents for summary process, employment, and breach of contract cases.
- Counseled *pro se* tenants regarding negotiations and motions as part of the Boston Housing Court's Attorney-for-the-Day Program.

OFFICE OF THE FEDERAL PUBLIC DEFENDER, Washington, DC — Fall 2017
Law Clerk

- Investigated and produced memoranda concerning Fourth Amendment challenges to unreasonable searches and seizures.
- Revised briefs for filing in the United States Court of Appeals for the District of Columbia Circuit regarding the Supreme Court's invalidation of the Armed Career Criminal Act's residual clause in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, Greenbelt, MD — Summer 2017
Judicial Intern for the Honorable Charles B. Day

- Authored legal memoranda on motions for summary judgment and judgment as a matter of law for cases arising under the Rehabilitation Act and the Americans with Disabilities Act, and for judicial dissolution of limited liability companies under Maryland law.
- Compiled memoranda concerning substantive and procedural issues regarding admiralty jurisdiction, maritime law, and 42 U.S.C. § 1983.

ADMISSIONS & LANGUAGES

Admitted for practice in the District of Columbia (D.C. Bar No. 1671252). Proficient in French.

Rosalia Quam-Wickham
The George Washington University Law School
Cumulative GPA: 3.459

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Research and Writing	Wolson	A	2	
Criminal Law	Fairfax	A	3	
Contracts I	Gabaldon	B-	3	
Torts	Schoenbaum	B	4	
Civil Procedure I	Schaffner	B+	3	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts II	Fairfax	B+	3	
Civil Procedure II	Peterson	B+	3	
Property	Schwartz	B-	4	
Constitutional Law I	Smith	B	3	
Introduction to Advocacy	Wolson	A	2	

Summer 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
The Craft of Judging	Beck	A-	2	
Field Placement		CR	2	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Comparative Law	Bignami	A	3	
Constitutional Law II	Bracey	A-	3	
Advanced Field Placement	Siconolfi	CE	0	
Field Placement	Tillipman	CR	2	
Moot Court - Van Vleck	Johnson	CR	1	
Int'l Law Review Note		P	1	
Research and Writing Fellow	Kettler	CR	1	
Evidence (Skills)	Saltzburg	A	4	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Research and Writing Fellow	Kettler	CR	1	
Criminal Procedure	Sacharoff	B+	3	
Negotiations	Juni	A-	2	

Administrative Law	Hammond	A-	3
Complex Litigation	Trangsrud	B+	3
Int'l Law Review Note		P	1

Thurgood Marshall Scholar -- Top 16% – 35% of the class to date

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Electronic Discovery & Evidence	Hirt	CR	1	
Professional Responsibility & Ethics	Tuttle	A-	2	
Research and Writing (Dean's) Fellow	DeSanctis	CR	2	
Corporations	Fairfax	B+	4	
International Law Review	Steinhardt	CR	1	
Law and Literature	DeSanctis	A	2	
White Collar Crime	Eliason	B+	3	

Thurgood Marshall Scholar -- Top 16% – 35% of the class to date

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
International Law Review	Steinhardt	CR	1	
Research and Writing (Dean's) Fellow	DeSanctis	CR	2	
Jurisprudence Seminar	Steinhardt	B+	2	
Antitrust Law	Kovacic	A	3	
Anti-Corruption And Compliance	Yukins & Tillipman	A-	2	
Federal Courts	Siegel	B	3	

Thurgood Marshall Scholar -- Top 16% – 35% of the class to date